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IN THE

Supreme Court of the United States

THOMAS GRABER and HOPKINS & SUTTER,

Petitioners,

v.

RICHARD L. FUQUA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent Richard Fuqua filed a Chapter 7 petition in bankruptcy court in Texas. Petitioner Hopkins & Sutter, acting as counsel for a creditor, filed an adversary proceeding in the bankruptcy court alleging Fuqua defrauded the creditor in a prior real estate deal. The bankruptcy court discharged Fuqua's debts and later granted a directed verdict for Fuqua following trial of the adversary proceeding. Fuqua never pursued any bankruptcy remedies against Petitioners (or the creditor) for alleged abuse of process. Instead, several years later, Fuqua sued Petitioners in Texas state court for malicious prosecution based on Petitioners' alleged wrongful filing of the adversary proceeding.

The question presented is:

Whether the Bankruptcy Code preempts a state-law malicious prosecution claim that is based solely on the filing of an adversary proceeding in bankruptcy court?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state the following:

Petitioner Hopkins & Sutter merged with Foley & Lardner LLP in 2000. Foley & Lardner has no parent corporation and no publicly held company has any ownership interest in the partnership.

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OPINIONS BELOW

The decision of the Supreme Court of Texas is reported at 279 S.W.3d 608 and reprinted at Appendix ("App.") A, 1a-58a. The order of the Texas Supreme Court denying Petitioners' motion for rehearing is unreported and is reprinted at App. D, 87a. The opinion of the intermediate Texas court of appeals is reported at 158 S.W.3d 635 and reprinted at App. B, 59a-84a. The order of the district court is unreported and is reprinted at App. C, 85a-86a.

JURISDICTION

The Texas Supreme Court issued its decision on January 26, 2009 and denied Petitioners' motion for rehearing on May 1, 2009. App. at 1a, 87a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article I, section 8 of the United States Constitution provides:

> The Congress shall have Power . . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.

INTRODUCTION

Congress first exercised its constitutional power "[t]o establish . . . uniform [l]aws on the subject of Bankruptcies" in 1800, and federal bankruptcy legislation has been in continuous existence since 1898. A "mere browse" through the detailed and comprehensive provisions of the Bankruptcy Code has led federal and state courts alike to conclude that it "demonstrates Congress' intent to create a whole system under federal control which is designed to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike." *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 914 (9th Cir. 1996).

The Bankruptcy Code includes both general and specific remedies to address alleged abuses of bankruptcy law and procedure by litigants. Even slight alterations to these remedies—whether for debtors or creditors—threaten the careful balancing of rights and obligations that Congress structured. For this reason, nearly all federal and state courts to confront the issue have held that the Bankruptcy Code preempts state-law tort claims like malicious prosecution that are based solely on conduct occurring in bankruptcy court.

Against this tide of authority, the Texas Supreme Court reached the opposite conclusion. By a 5 to 4 margin, the court held that the Bankruptcy Code does not preempt a state-law malicious prosecution claim that is based on the filing of an adversary claim in a voluntarily initiated bankruptcy proceeding. Not only does the majority decision conflict with the weight of federal and state authority but its reasoning contravenes a number of this Court's precedents. The majority decision (1) wrongly applies a presumption against preemption in an area where there has been a long history of federal presence, (2) refuses to consider congressional intent manifested by the Bankruptcy Code as a whole, and (3) dismisses as inconsequential the negative impact that state-law malicious prosecution claims will have on Congress' careful balancing of rights and obligations in the Bankruptcy Code. Because of the unique and important federal interests at stake, this case warrants plenary review by the Court.

STATEMENT OF THE CASE

In 1988, Richard Fuqua filed a Chapter 7 petition in federal bankruptcy court. App. at 2a. Several months later, Sunbelt Savings—represented by Petitioner Hopkins & Sutter—filed an adversary proceeding alleging that Fuqua defrauded Sunbelt in a pre-petition real estate transaction. App. at 2a.

During the pendency of the adversary proceeding, Petitioners Thomas Graber and Hopkins & Sutter (collectively, "Hopkins & Sutter") allegedly provided the United States Department of Justice with information about Fuqua that sparked a criminal investigation.

App. at 2a. The bankruptcy judge stayed the adversary proceeding pending the investigation, indictment and criminal trial of Fuqua. App. at 2a-3a. In 1993, while the adversary proceeding was still stayed, the bankruptcy court discharged Fuqua's debts. App. at 3a, 29a. After the criminal case ended in a verdict of acquittal, the adversary proceeding resumed and eventually went to trial. App. at 3a, 29a-30a. The bankruptcy court granted Fuqua a directed verdict and entered judgment in 1997. App. at 3a, 30a. Sunbelt's subsequent appeal was dismissed by the federal district court the next year, and no further appeals were taken. App. at 3a, 30a.

Fuqua never sought relief in the bankruptcy court for any alleged abuse of process by Sunbelt or Hopkins & Sutter. Instead, in 2000, Fuqua filed a civil malicious prosecution claim against Hopkins & Sutter in Texas state court. App. at 3a. Fuqua's claim was based solely on Hopkins & Sutter's filing of the Sunbelt adversary claim.[1] App. at 3a, 91a, 93a-95a Hopkins & Sutter asserted that Fuqua's state-law claim was preempted by the Bankruptcy Code. App. at 99a-100a. The district court agreed and dismissed Fuqua's suit in November 2002. App. at 85a-86a.

Fuqua appealed and an intermediate Texas court of appeals reversed. App. at 59a-84a. Hopkins & Sutter then filed a petition for review in the Texas Supreme Court, which the court granted. App. at 3a. In a 5-4 decision, the Texas Supreme Court held that the

1. Fuqua also asserted a claim for criminal malicious prosecution but the state court dismissed that claim on limitations grounds. App. at 3a, 88a-98a. The claim for criminal malicious prosecution is not at issue here. App. at 3a.

Bankruptcy Code does not preempt a state-law claim for malicious prosecution even though the claim was based solely on the filing of an adversary proceeding in bankruptcy court. App. at 1a-58a.

REASONS FOR GRANTING THE PETITION

Although "the overwhelming majority of courts who have addressed the identical issue have held that the Bankruptcy Code pre-empts state law claims arising from an abusive bankruptcy filing or other wrongful conduct committed during the course of a bankruptcy case," *Williams v. Asset Acceptance, LLC (In re Williams)*, 392 B.R. 882, 886 (Bankr. M.D. Fla. 2008) (compiling cases), a sharply divided Texas Supreme Court reached the opposite conclusion. *See generally* App. at 1a-58a. Under the majority's decision, a Texas jury may apply state common law to decide whether a creditor properly invoked bankruptcy remedies against a debtor who voluntarily avails himself of the rights and protections afforded by federal bankruptcy law.

The majority decision conflicts with the decisions of at least three federal circuit courts and a state court of last resort. What is more, the majority based its decision on a novel preemption analysis that conflicts with this Court's precedent. Further, the majority failed to recognize the chilling effect on parties in bankruptcy proceedings who face the threat of state-law tort litigation years after a bankruptcy proceeding has concluded. For each of these reasons, review by this Court on a writ of certiorari is warranted, especially considering the importance of the federal question involved.

I. The Texas Supreme Court Decided an Important Federal Question in a Way that Conflicts with Decisions of Several United States Courts of Appeals and at Least One State Court of Last Resort.

The Texas Supreme Court's 5-4 decision directly conflicts with a decision of the United States Court of Appeals for the Ninth Circuit. In *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 911-12 (9th Cir. 1996), the debtor (MSR) filed a Chapter 11 petition in bankruptcy court. Defendants then filed creditors' claims against MSR to collect monies MSR allegedly owed them under a pre-petition contract. *Id.* at 911-12. MSR objected to these claims and the bankruptcy court dismissed them. *Id.* at 912. MSR "did not pursue sanctions, attorneys fees, or any other remedy in the bankruptcy court," but instead waited to sue under state law for malicious prosecution after its bankruptcy reorganization plan had been confirmed and substantially consummated. *Id.* As with Fuqua's claim here, the "complaint filed by MSR is self-consciously and entirely one which seeks damages for a [creditor's] claim filed and pursued in the bankruptcy court." *Id.*; App. at 88a-98a.

The Ninth Circuit held that MSR's malicious prosecution claim was preempted by the Bankruptcy Code for several reasons. *MSR Exploration*, 74 F.3d at 913. *First*, the court observed, "Congress has expressed its intent that bankruptcy matters be handled in a federal forum by placing bankruptcy jurisdiction exclusively in the federal courts." *Id.* *Second*, the Bankruptcy Code's "complex, detailed, and comprehensive provisions" indicate Congress' intent to

create "a whole system under federal control" that should be "jealously guard[ed] from even slight incursions and disruptions brought about by state malicious prosecution actions." *Id. Third*, "the unique, historical, and even constitutional need for uniformity in the administration of the bankruptcy laws is another indication that Congress wished to leave the regulation of parties before the bankruptcy court in the hands of the federal courts alone." *Id.* at 915. *Fourth*, the fact that Congress provided a number of remedies for the misuse of bankruptcy process shows Congress specifically considered and addressed the issue and did not merely overlook the creation of remedies or leave them to be supplied by state-law tort actions. *Id. Fifth*, and finally, the court reiterated the need for preemption in this context to respect and preserve the delicate balance of rights and obligations Congress established in the Bankruptcy Code. "Whether creditors should be deterred, and when, is a matter unique to the flow of the bankruptcy process itself—a matter solely within the hands of the federal courts." *Id.* at 916.

There is no way to square the majority's decision in this case with *MSR*. Indeed, the majority acknowledged *MSR*'s holding but expressly rejected it. App. at 26a-27a, n.13 (stating with respect to *MSR* and similar cases that "the opinions of those jurisdictions do not bind us; nor do the arguments that they have accepted persuade us").[2]

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2. The majority identifies *Paradise Hotel Corp. v. Bank of N.S.*, 842 F.2d 47 (3d Cir. 1988), as providing some measure of support for the holding in this case. App. at 26a-27a, n.13. But the Third Circuit's decision does not bear out that conclusion.

(Cont'd)

Nor can the majority's decision be reconciled with other federal circuit court decisions that have applied *MSR*'s reasoning to preempt state-law claims arising from alleged abuses of other bankruptcy procedures. In *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000), for instance, the plaintiff filed a class action alleging that Ford's attempts to have bankruptcy debtors reaffirm their debts to Ford violated the automatic stay and constituted unjust enrichment under state law. *Id.* at 419-20. Quoting extensively from *MSR*, the Sixth Circuit concluded that plaintiff's state law claim was preempted by the Bankruptcy Code because "[p]ermitting assertion of a host of state law causes of action to redress wrongs under the Bankruptcy Code would undermine the uniformity the Code endeavors to preserve and would stand as an obstacle to the accomplishment and execution of the full purposes and

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(Cont'd)

In *Paradise Hotel*, the court merely allowed a debtor who had converted to a Chapter 11 bankruptcy to pursue state malicious prosecution claims against a creditor for the wrongful filing of an involuntary Chapter 7 bankruptcy petition. *Id.* at 52. The court explained that Congress did not intend to place a Chapter 7 debtor "on the horns of a dilemma by requiring it to choose between two unattractive alternatives"—*i.e.*, hold off converting to a more favorable Chapter 11 bankruptcy just to pursue a Chapter 7 remedy for abuse of process, or immediately convert to Chapter 11 and give up all rights for alleged abuse of the involuntary bankruptcy process. *Id.* This unique situation suggests not a general opposition to preemption, but rather an intent to preserve the remedial scheme Congress created. *See In re John Richards Homes Bldg. Co.*, 298 B.R. 591, 598 (Bankr. E.D. Mich. 2003) (stating *Paradise Hotel* should be limited to its unique facts).

objectives of Congress." *Id.* at 426 (internal quotation marks omitted).

The Second Circuit also has held that state-law claims (including abuse of process and malicious prosecution) based on alleged violations of the automatic stay are preempted by the Bankruptcy Code. *Eastern Equip. & Servs. Corp. v. Factory Point Nat'l Bank*, 236 F.3d 117, 119-21 (2d Cir. 2001). In reaching this conclusion, the court relied extensively on *MSR's* analysis and rationale.[3] *Id.* at 121.

While noting its conflict with *MSR* and other state and federal decisions, App. 26a-27a, n.13, the Texas Supreme Court does not even acknowledge the Pennsylvania Supreme Court's conflicting decision in *Stone Crushed Partnership v. Kassab Archbold Jackson*

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3. A number of lower federal courts also have recognized that state-law tort claims based on conduct in bankruptcy proceedings are preempted by the Bankruptcy Code. *See, e.g., Glannon v. Garrett & Assocs.*, 261 B.R. 259, 263-65 (D. Kan. 2001) (holding malicious prosecution claims based on filing of involuntary bankruptcy proceeding and adversary proceeding are preempted by the Bankruptcy Code); *Koffman v. Osteoimplant Tech., Inc.*, 182 B.R. 115, (D. Md. 1995) (holding that abuse of process and malicious prosecution claims based on alleged violation of automatic stay or bad-faith filing of involuntary bankruptcy petition are preempted by the Bankruptcy Code); *Virginia Hosp. Center-Arlington Health Sys. v. Akl (In re Akl)*, 397 B.R. 546, 555-56 (Bankr. D. D.C. 2008) (indicating without deciding that debtor's abuse of process, malicious prosecution, and intentional infliction of emotional distress counterclaims stemming from adversary proceeding filed by creditor were preempted by the Bankruptcy Code).

& O'Brien, 908 A.2d 875 (Pa. 2006).[4] In that case, the debtor sought relief under Chapter 11 of the Bankruptcy Code. Stone Crushed Partnership, a creditor, filed an adversary proceeding to exempt certain monies from discharge. *Id.* at 878. The debtor filed counterclaims, which were dismissed, and the creditor prevailed on summary judgment. *Id.* at 878. Several years later, the creditor filed suit in Pennsylvania state court against the debtor alleging wrongful use of civil proceedings and abuse of process based on the debtor's filing of counterclaims in the adversary proceeding. *Id.* at 879. The state court ruled the claim was preempted by the Bankruptcy Code.

On appeal, the Pennsylvania Supreme Court held "that the Bankruptcy Code preempts a state-law claim of abuse of process based upon a frivolous claim filed in Bankruptcy Court proceedings." *Id.* at 880. After analyzing arguments on both sides of the issue, the court concluded that the Bankruptcy Code evinced Congress' intent to preempt these types of state law claims and afforded injured parties adequate remedies for abuse of process in bankruptcy court. *Id.* at 880-887.

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4. The Texas Supreme Court's decision conflicts not only with the Pennsylvania Supreme Court's decision in *Stone* but also with other lower state court decisions. *See, e.g.*, *Ross v. Universal Studios Credit Union*, 115 Cal. Rptr. 2d 712, 714-15 (Ct. App. 2002) (holding malicious prosecution claim based on an adversary proceeding preempted by the Bankruptcy Code); *Pauletto v. Reliance Ins.* Co., 75 Cal. Rptr. 2d 334, 336-340 (Ct. App. 1998) (same); *Shiner v. Moriarty*, 706 A.2d 1228, 1238 (Pa. Super. Ct. 1998) ("the Bankruptcy Code permits no state law remedies for abuse of its provisions").

* * *

The decision of the Texas Supreme Court directly conflicts on an important federal question not only with decisions of several United States courts of appeals, but also with a decision of another state court of last resort. Indeed, "the vast majority of courts have held that the Bankruptcy Code preempts state law claims allegedly arising from an abusive bankruptcy filing or other wrongful conduct committed during the course of a bankruptcy case." *Pariseau v. Asset Acceptance, LLC (In re Pariseau)*, 395 B.R. 492, 495 (Bankr. M.D. Fla. 2008); *see also In re Williams*, 392 B.R. at 886 (same). Because of the important federal interests at stake, this conflict merits review by the Court.

II. The Texas Supreme Court's Decision Relies on a Preemption Analysis that Conflicts with this Court's Precedent.

The Texas Supreme Court reached a result contrary to the vast majority of cases because it employed a preemption analysis that conflicts with the framework established by this Court's precedents. Among other things, the court employed an inapplicable presumption against preemption, unduly narrowed its preemption analysis to isolated Bankruptcy Code provisions, and required express congressional statements evidencing preemption as a prerequisite to finding *implied* preemption. Because the Texas Supreme Court's analysis conflicts with the most basic tenets of federal preemption law, this conflict too merits the Court's review on a writ of certiorari.

1. The Texas Supreme Court's majority decision states that "[i]n *all* preemption cases, our analysis must begin with a presumption that Congress did not preempt state law." App. at 5a (emphasis added). By the majority's own acknowledgment, this presumption led the court to "err in favor of the states" in what it viewed as "a difficult case." App. at 26a-27a.

Granting that a presumption against preemption does arise in some cases, the presumption does not apply in "all cases," App. at 5a, and it certainly does not apply in this case. The Court has made clear that the presumption against preemption "is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000); *see also Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) ("assumption" is triggered where "the field which Congress is said to have pre-empted has been traditionally occupied by the States"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (applying presumption in a case involving medical negligence, a subject historically regulated by the states).

There is no question that Congress has been granted—and has exercised—a longstanding federal presence in the bankruptcy field. From the beginning, the Constitution gave Congress alone the "Power" to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. In defending the need for uniformity, James Madison wrote:

> The power of establishing uniform laws of bankruptcy is so intimately connected with

> the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of [providing Congress the power to provide uniform bankruptcy laws] seems not likely to be drawn into question.[5]

In furtherance of this federal power, Congress passed the Bankruptcy Acts of 1800 (repealed in 1803), 1841 (repealed in 1843), 1867 (repealed in 1878) and 1898. The 1898 Act remained in effect until it was overhauled and codified by the Bankruptcy Code of 1978, and then substantially amended again in 1984, 1986, and more recent years. *See generally* 1 LAWRENCE P. KING, COLLIER ON BANKRUPTCY ¶¶ 1.01 to 1.02 (15th ed. 2009).

In contrast to the history of significant federal presence in the bankruptcy field, Texas has no discernable interest in subjecting bankruptcy court litigants to state-law malicious prosecution claims. In fact, for more than a century, Texas courts have expressed reservations about malicious prosecution claims based on alleged abuses of process occurring in *their own* courts. *See, e.g., N.T. Dev., Inc. v. Petersen*, 79 S.W.3d 230 (Tex. App.—Fort Worth 2002); *see also Salado College v. Davis*, 47 Tex. 131, 135-36 (1877) (indicating it is "the policy of the law to content itself with meting out something less than . . . natural justice would demand, rather than to increase the risks attending and discouraging such a resort, and at the

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5. THE FEDERALIST NO. 42, at 308 (James Madison) (Benjamin Fletcher Wright ed. 1961).

same time add to the difficulties and intricacies of ordinary litigation"). A state-law claim disfavored even when based on conduct occurring in the state's own courts certainly does not merit a presumption against preemption when it is based on conduct occurring in federal bankruptcy court.

On this point, the Texas Supreme Court's decision stands alone. Petitioners have found no other case addressing the Bankruptcy Code's preemption of state-law malicious prosecution claims that has applied a presumption against preemption. The majority erred by skewing its analysis against preemption based on this presumption.

2. Applying an improper presumption against preemption led the majority into a second conflict with this Court's precedent. The majority refused to consider the Bankruptcy Code as a whole in ascertaining congressional intent to preempt, stating it would be an improper "blanket analysis" that "ignores relevant distinctions between various bankruptcy processes, and . . . undervalues the presumption against preemption." App. at 7a. Instead, the majority adopted an unduly narrow preemption analysis that examines only "the extent to which Congress contemplated remedies for abuse of a bankruptcy adversary proceeding, the particular action on which Fuqua based his malicious prosecution claim." App. at 7a-8a.

The majority's parsing of the Code to determine whether any isolated provision implies preemption conflicts with this Court's precedents. In construing the Bankruptcy Code, the Court has reiterated that it

"must not be guided by a single sentence or member of a sentence, but [must] look to the provisions of the whole law, and to its object and policy." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (internal quotation marks omitted); *see also Pennsylvania Dep't. of Pub. Welfare v. Davenport*, 495 U.S. 552, 560-6 (1990) (analyzing language and structure of Bankruptcy Code as a whole in determining whether the Code allows discharge of state-ordered criminal restitution payments). The "ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the [federal] statute as a whole." *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

This holistic approach has led numerous courts to conclude that "a mere browse through the complex, detailed, and comprehensive provisions of the lengthy Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, demonstrates Congress' intent to create a whole system *under federal control* which is designed to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike." *MSR Exploration*, 74 F.3d at 914 (emphasis added); *see also Pertuso*, 233 F.3d at 425 (quoting *MSR Exploration* and adding that "[t]he pervasive nature of Congress' bankruptcy regulation can be seen by glancing at the Code"); *Stone Crushed P'ship*, 908 A.2d at 887 (stating that the "Bankruptcy Code demonstrates Congress' intent to create a whole system under federal control therefore mandating that the adjustment of rights and duties within the bankruptcy process itself is uniquely and exclusively federal, thereby precluding state law remedies for abuse of its proceedings") (internal quotation marks omitted).

Isolating remedial bankruptcy provisions based on whether they are "custom-built" for bankruptcy or "merely imported" from other areas of the law, as the majority decision does, *see, e.g.*, App. at 8a-9a, presents a false dichotomy for preemption purposes. The premise itself dilutes the very congressional intent on which preemption relies. As the dissenting justices in *Graber* pointed out, "[t]he authority bestowed on bankruptcy courts by federal law arms them with a broad array of remedies to regulate the conduct of parties, issue injunctive relief, and award sanctions and damages for maliciously initiating proceedings." App. at 38a (Wainwright, J., dissenting). Section 105(a) of the Bankruptcy Code, for example, empowers bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate . . . to prevent an abuse of process." 11 U.S.C. § 105(a). That means the bankruptcy court can issue "any type of order, whether injunctive, compensative or punitive, as long as it is 'necessary or appropriate to carry out the provisions'" of the Bankruptcy Code. *Hardy v. United States (In re Hardy)*, 97 F.3d 1384, 1389 (11th Cir. 1996) (citing 11 U.S.C. § 105(a)).

Bankruptcy Rule 9011 also empowers bankruptcy courts to impose "an appropriate sanction upon the attorneys, law firms, or parties" that have presented to the court pleadings, motions, or "other paper" containing allegations, factual contentions, or claims and defenses that generally have no evidentiary support and are not warranted by existing law. Moreover, the court "may award to the party prevailing on the motion"

reasonable expenses and attorney's fees. Fed. R. Bankr. P. 9011(c)(1)(A). Rule 9011 also authorizes orders "directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." *Id.* at 9011(c)(2).

The *Graber* dissent also noted that "section 303(i) [of Title 11] provides a close analogue to a Texas common law malicious prosecution claim, authorizing awards to debtors for reasonable attorneys' fees, costs, and actual or punitive damages when the court dismisses an involuntary petition." App. at 44a (Wainwright, J., dissenting). While section 303(i) only applies to involuntary cases, it confirms that Congress recognized the "wide panoply of available remedies for abuse of process and then associated sanctions and awards with selected violations of the Code and the Rules." *Id.* at 44a. Congress provided "sanctions for certain violations of Bankruptcy Code provisions, injunctive relief for some, actual damages for others, and punitive damages for a few." *Id.* As the dissent observed, the existence of these bankruptcy remedial provisions "'suggests that Congress has considered the need to deter misuse of the process and has not merely overlooked the creation of additional deterrents.'" *Id.* (quoting *MSR Exploration*, 74 F.3d at 915).

In the final analysis, the majority's focus on what it called "custom built" provisions of the Bankruptcy Code, to the exclusion of the Code's entire remedial scheme, fundamentally is at odds with the settled rule that "when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of

no less force than that which is expressed." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000) (internal quotation marks omitted).

3. The majority's preemption analysis also conflicts with the Court's precedents in a third way: Texas courts now apparently require that Congress expressly evince an intent to preempt before it may be said that a federal statute *impliedly* preempts state law. This approach to implied preemption defies an untold number of decisions by this Court.

To be sure, "[t]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted). And Congress may well choose to make "its intent known through explicit statutory language." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). But "[e]ven without an express provision for preemption," Congress' intent to preempt may be implied in various circumstances, including "a pervasive statutory scheme indicating an intent to occupy the field or when state and federal law conflict . . . because . . . the challenged state law obstructs the accomplishment and execution of the full purposes and objectives of Congress." *Crosby*, 530 U.S. at 372-373 (citing numerous cases); *see also English*, 496 U.S at 79. For preemption purposes, whether Congress' intent is express or implied makes no difference because "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict." *Crosby*, 530 U.S. at 373.

The majority decision nominally acknowledges that Congress' intent to preempt may be implied but then concludes that preemption cannot be derived "from congressional *silence*." App. at 2a; *see also id.* at 26a ("Because Congress was silent on the matter. . . ."). To find implied preemption, the majority said, Congress was required to "speak more clearly than it has," *id.* at 19a, and to express its "intent more clearly." *Id.* at 12a (internal quotation marks omitted). But if Congress had spoken at all, this would be a case of express preemption. In implied preemption cases, Congress' failure to speak on the subject of preemption necessarily is not relevant. *See, e.g., Crosby*, 530 U.S. at 373, 388; *see also Transcontinental Pipe Line Corp. v State Oil & Gas Bd.*, 474 U.S. 409, 422 (1986) ("[A] federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate." (internal quotation marks omitted)).

The majority adopted a rule for application in all Texas state courts in which the absence of statements from Congress expressing an intent to preempt means there can be no implied preemption either. But as the Court has stated, "[a] failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply." *Crosby*, 530 U.S. at 387-88. The Texas Supreme Court not only failed to "dependably apply" the implied preemption doctrine, it effectively nullified it.

III. The Texas Supreme Court's Decision Ignores the Unique Federal Interest in Uniformity that Congress Sought to Protect in the Bankruptcy Code.

Assessing Congress' intent to preempt is "a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby*, 530 U.S. at 373. State law will be preempted where a conflict "exists between an identifiable federal policy or interest and the [operation] of state law, or the application of state law, would frustrate specific objectives of federal legislation." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988) (internal quotations and citations omitted). Importantly, "the fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can." *Id.* at 507-08. That certainly holds true in the bankruptcy context. *See, e.g. Kelly*, 479 U.S. at 43 (in construing the Bankruptcy Code, courts must "look to the provisions of the whole law, and to its object and policy") (internal quotations omitted).

The majority decision dismisses as unimportant several of the federal policies at stake here, including the need for uniformity in bankruptcy law. App. at 18a-25a. As other courts have recognized:

> the problem here is not only one of state courts deciding issues of federal law in one manner or another. That is not an entirely unique situation, even when uniformity is required. The difficulty here goes much deeper. It is a

> question of state courts, in effect, interfering with the whole complex, reticulated bankruptcy process itself.

MSR Exploration, 74 F.3d at 914.

The Bankruptcy Code represents Congress' careful balancing of rights and duties between creditors and debtors to enable prompt and peaceful resolution of claims. *See, e.g., Grogan v. Garner,* 498 U.S. 279, 286 (1991) ("a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life"); *Stellwagen v. Clum,* 245 U.S. 605, 617 (1918) ("The federal system of bankruptcy is designed not only to distribute the property of the debtor . . . fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start."). Preemption protects the balance Congress achieved by eliminating the chilling effect that state-law tort claims would have on debtors and creditors alike in bankruptcy proceedings.

The prospect of such a chilling effect in cases like this one is clear.

> A creditor's claim may be unmeritorious, but then so too might a debtor's [bankruptcy] petition. In fact, a creditor may have less flexibility than a debtor. The debtor initiates the process and, as here, can obtain a cutoff date for the filing of claims. The creditor may have less time to ruminate on the merits of

> the claim before filing it. A failure to appear in a timely fashion may well forfeit whatever rights the creditor might have. Thus, while a creditor's claim cannot be said to be solely defensive in nature, it does have that flavor to some extent. The threat of later state litigation may well interfere with the filing of claims by creditors and with other necessary actions that they, and others, must or might take within the confines of the bankruptcy process. Whether creditors should be deterred, and when, is a matter unique to the flow of the bankruptcy process itself—a matter solely within the hands of the federal courts.

MSR Exploration, 74 F.3d at 916.

Outside bankruptcy, a party normally has ample time and ability to fully investigate claims. But in a voluntary bankruptcy, creditors must use the forum the debtor selected and generally must bring their claims in a matter of days, not years, or the claims cannot be asserted. When these fundamental differences are considered, Congress' intention to preempt malicious prosecution claims brought by debtors who complain of actions taken under federally created statutes solely within a bankruptcy case is all the more evident. "It is very unlikely that Congress intended to permit the superimposition of state remedies on the many activities that might be undertaken in the management of the bankruptcy process." *Id.* at 914; *see also Periera v. Chapman*, 92 B.R. 903, 908 (C.D. Cal. 1988) (statutory

scheme provided by Bankruptcy Code reflects a "balance, completeness and structural integrity that suggests remedial exclusivity").

The Texas Supreme Court dismissed these concerns with an inapposite comparison, holding that because federal law does not preempt state malicious prosecution claims based on conduct in run-of-the-mill federal litigation, the Bankruptcy Code does not preempt such claims when based on bankruptcy court conduct. App. at 10a-14a, 17a-18a. But general federal litigation and federal bankruptcy proceedings involve quite different considerations and incentives for the participants. That is the very reason Congress created the vast, detailed and complex Bankruptcy Code (not to mention the Article I bankruptcy court system with jurisdiction over adversary cases).

That is also why it is for Congress to say what incentives and penalties are appropriate in the bankruptcy process and when those incentives and penalties are available to allegedly aggrieved debtors or creditors. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 644 (1992) (noting the Code already provides remedies to address a debtor's improper conduct in bankruptcy, but to the extent the Code does not deter the debtor from making bad faith claims for exemptions, "Congress may enact comparable provisions to address the difficulties"). As Justice Story observed in noting the importance of a uniform system of bankruptcy:

> It is obvious, that if the power [to establish bankruptcy laws] is exclusively vested in the states, each one will be at liberty to frame such a system of legislation upon the subject of

> bankruptcy and insolvency, as best suits its own local interests and pursuits. Under such circumstances no uniformity of system or operations can be expected . . . . There can be no other adequate remedy than giving a power to the general government to introduce and perpetuate a uniform system.[6]

The negative impact of state-law malicious prosecution suits on federal bankruptcy interests and policies is simply too great—especially when compared with a non-existent state interest in regulating conduct in federal bankruptcy court—to permit the Texas Supreme Court's decision to stand. The decision addresses an important issue that affects thousands of bankruptcy cases and litigants. In just the twelve-month period ending March 31, 2009, more than 44,000 bankruptcy cases were filed in Texas.[7] Each of the thousands of debtors and creditors in these—and countless other previously filed—cases are now subject to potential malicious prosecution claims in state courts throughout Texas based on their actions in bankruptcy court.[8] Congress' careful adjustment of bankruptcy

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6. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1107 (2d ed. 1851).

7. *See* Report F-5A, U.S. Bankruptcy Courts Business and Nonbusiness Bankruptcy County Cases Commenced, By Chapter of The Bankruptcy Code, During The Twelve Month Period Ended Mar. 31, 2009, *available at* http://pacer.uspci.uscourts.gov/download/hl0028-142557.txt.

8. This interference with federal bankruptcy interests may not be confined for long to Texas. At least one bankruptcy court, in *dicta*, has approvingly cited Graber's reasoning and holding. (Cont'd)

rights and remedies should not be judicially altered by the specter of additional state-law tort litigation that would "haunt virtually every actor in a bankruptcy proceeding." *MSR Exploration*, 74 F.3d at 916.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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In re Fornaro, 402 B.R. 104, 110 (Bankr. D. N.J. 2009) (stating "[t]he Court agrees with a recent Texas Supreme Court case decision, holding that malicious prosecution suits are not preempted, even though the claim arose in a bankruptcy action").

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF TEXAS DECIDED JANUARY 9, 2009

SUPREME COURT OF TEXAS

No. 05-0303.

Thomas GRABER and Hopkins & Sutter,

Petitioners,

v.

Richard L. FUQUA,

Respondent.

Argued Jan. 26, 2006.
Decided Jan. 9, 2009.
Rehearing Denied May 1, 2009.

Justice GREEN delivered the opinion of the Court, in which Chief Justice JEFFERSON, Justice HECHT, Justice O'NEILL, and Justice JOHNSON joined.

The question in this case is whether a state malicious prosecution claim is preempted by the federal bankruptcy regime simply because the claim arose out of the filing of an adversary action in a bankruptcy proceeding. We hold that under the facts of this case, Congress did not intend for such a claim to be preempted.

Appendix A

In a Texas trial court, Richard Fuqua alleged that Thomas Graber and Hopkins & Sutter had committed the common law tort of malicious prosecution by initiating an adversary proceeding in Fuqua's federal bankruptcy case. The petitioners argue that federal bankruptcy statutes express Congress's intent to preempt Fuqua's claim and others like it. But to hold as the petitioners suggest would require us to extract the requisite intent from congressional *silence*, an inference that our preemption jurisprudence does not allow. The petitioners further argue that permitting Fuqua's state malicious prosecution claim would impermissibly threaten the uniformity of federal bankruptcy law. Yet we can identify no such risk. Until Congress clearly says otherwise, preemption of Fuqua's malicious prosecution claim is not warranted. Fuqua's suit should have survived Graber's plea to the jurisdiction.

I

In 1988, Fuqua filed a voluntary Chapter 7 bankruptcy petition in federal bankruptcy court. Several months later, Graber and Hopkins & Sutter (collectively Graber) initiated an adversary proceeding against Fuqua on behalf of their client, Sunbelt Savings, F.S.B. Graber argued that Fuqua had conspired with others to defraud Sunbelt in a previous real estate transaction. According to Fuqua, Graber obtained information in the adversary proceeding and forwarded it to the Justice Department, resulting in a criminal investigation of Fuqua. The bankruptcy judge stayed the adversary proceeding during the investigation.

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Fuqua was indicted for bank fraud and tax fraud, the case went to trial, and Fuqua was found not guilty on all charges. After the completion of Fuqua's criminal trial, the adversary proceeding resumed. The bankruptcy court granted Fuqua's motion for a directed verdict and entered judgment in his favor. Graber, on behalf of Sunbelt, appealed the judgment to the federal district court, which dismissed the appeal in 1998. No further appeals were taken.

In 2000, Fuqua sued Graber alleging both a claim of civil malicious prosecution based on Graber's filing of the adversary proceeding and a claim of criminal malicious prosecution based on the later criminal indictment. With respect to the criminal malicious prosecution claim, the trial court granted summary judgment in favor of Graber because the statute of limitations had run. Fuqua did not appeal that order. With respect to the civil malicious prosecution claim, Graber filed a plea to the jurisdiction, arguing that the court lacked jurisdiction because federal bankruptcy law preempted Fuqua's claim. Without a response from Fuqua, the trial court granted Graber's plea. Fuqua appealed and the court of appeals reversed, rejecting Graber's argument for preemption and remanding the case to the trial court. 158 S.W.3d 635. We granted Graber's petition for review.

Appendix A

II

When Congress has not expressly commanded preemption, courts recognize two categories of implied preemption: (1) when Congress sufficiently evidences its intent to exclusively "occupy the field," and (2) when the state law conflicts with the federal law by making simultaneous compliance impossible or by creating an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000); *accord Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex.2001). But because "the categories of preemption are not 'rigidly distinct,' " these semantic categories do not always control. *Crosby*, 530 U.S. at 372 n. 6, 120 S.Ct. 2288 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n. 5, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990)). " 'The purpose of Congress is the ultimate touchstone' in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (quoting *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963)).

Graber does not argue this case as one where the federal jurisdictional statutes have stripped state courts of jurisdiction. Unlike "cases under [the Bankruptcy Code]," over which federal courts possess exclusive jurisdiction, state and federal courts share concurrent jurisdiction over "all civil proceedings arising under [the Bankruptcy Code], or arising in or related to cases under [the Bankruptcy Code]." 28 U.S.C. § 1334(a)-(b).

Indeed, a malicious prosecution claim predicated on conduct in an adversary proceeding does not fall within the federal courts' exclusive section 1334(a) jurisdiction. *See Wood v. Wood (In re Wood),* 825 F.2d 90, 92 (5th Cir.1987) ("The [section 1334(a)] category refers merely to the bankruptcy petition itself, over which district courts (and their bankruptcy units) have original and exclusive jurisdiction."). Graber argues that the trial court lacks subject matter jurisdiction because federal law completely preempts the substance of Fuqua's malicious prosecution claim. No matter how categorized, Graber's argument for preemption is reducible to two propositions: (1) Congress intended to occupy the field of regulating abuses of the bankruptcy process, and purposefully chose to exclude state malicious prosecution claims; and (2) state malicious prosecution claims will impermissibly disrupt the uniformity of bankruptcy law. We disagree with both.[1]

In all preemption cases, our analysis must begin with a presumption that Congress did not preempt state law. *Great Dane Trailers,* 52 S.W.3d at 743; *see also Medtronic,* 518 U.S. at 485, 116 S.Ct. 2240 ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."). The presumption applies not only to *whether* Congress

1. Because we conclude that federal law does not preempt Fuqua's claim, we express no opinion on the separate question of whether preemption would operate to deprive the trial court of subject matter jurisdiction.

preempted state law at all, but also to the *scope* of preemption. *Medtronic*, 518 U.S. at 485, 116 S.Ct. 2240; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). As noted by the United States Supreme Court:

> Under our constitutional system, there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction. . . . States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.

Kelly v. Wash. ex rel. Foss Co., 302 U.S. 1, 10-11, 58 S.Ct. 87, 82 L.Ed. 3 (1937) (internal quotations omitted). Thus, Congress's intent to preempt must be "clear and manifest" to overcome this presumption. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005). Beginning with this presumption, we address Graber's two arguments.

A

In general, federal law does not preempt a state malicious prosecution claim predicated on conduct occurring in standard federal civil actions. *See, e.g., U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 388-94 (3d Cir.2002). But of course, the claim made in this case is not predicated on a normal suit-it is predicated on conduct occurring in bankruptcy. Thus, the determinative question here is simple: Did Congress intend to produce an exceptional preemption result when it enacted the Bankruptcy Code? Graber argues that the Bankruptcy Code's remedial scheme evidences Congress's intent to exclusively occupy the field of regulating abuses of the bankruptcy process. But as an initial matter, Graber frames the scope of our inquiry too broadly. The relevant inquiry is not whether Congress contemplated remedies for abuses of the bankruptcy process generally, for that kind of blanket analysis ignores relevant distinctions between various bankruptcy processes, and it undervalues the presumption against preemption. Instead, we must determine the extent to which Congress contemplated remedies for abuse of a bankruptcy adversary

proceeding, the particular action on which Fuqua based his malicious prosecution claim.[2]

Bankruptcy Code remedial provisions must be interpreted with reference to their source because Congress enacted the bankruptcy statutes according to two very different methods: some parts were essentially custom-built, others were not. In some places, Congress envisioned the need for unique processes without analogs in general federal litigation. For those areas, Congress created new processes for the specific purpose of bankruptcy. *See, e.g.*, 11 U.S.C. § 362 (2000) (automatic stay); *id.* § 301 (voluntary petitions); *id.* § 303 (involuntary petitions). But in many other places, Congress saw no need to treat bankruptcy any differently from general federal litigation. For those areas, Congress either imported existing federal rules or enacted almost identical provisions. *See, e.g.*, FED. R. BANKR.P. 7001-7087 (adversary proceeding rules). Bankruptcy remedies for abuse of process reflect this same dichotomy. When Congress created unique procedures, it simultaneously created unique remedial provisions. *See, e.g.*, 11 U.S.C. § 362(k)[3] (debtor's

2. The adversary proceeding deserves specific preemption analysis because it is a principal bankruptcy process, separate from the remainder of a bankruptcy case. *See generally* 9 AM.JUR.2D *Bankruptcy* §§ 22-24, 87, 706, 1229, 3782 (2006); 1 DANIEL R. COWANS, BANKRUPTCY LAW AND PRACTICE §§ 3.15, 3.18 (7th ed.1998).

3. The 2005 amendments to the Bankruptcy Code moved this provision from section 362(h) to section 362(k). Pub.L. No. 109-8, § 305(1)(B), (C), 119 Stat. 41 (2005). However, the substance is the same.

remedies for violation of automatic stay); *id.* § 303(i) (debtor's remedies for dismissed involuntary petitions). And when Congress merely imported general federal procedures, it simultaneously imported federal law's existing remedial schemes. *See* FED. R. BANKR.P. 9011 (mirroring Federal Rule of Civil Procedure 11); 1 COWANS, *supra*, § 3.15 ("The Bankruptcy Rules covering litigation were not made up specially for bankruptcy. They lean heavily upon the Federal Rules of Civil Procedure.").[4]

Therefore, the question of whether Congress intended to produce an exceptional preemption result when it enacted the Bankruptcy Code produces two answers. In the areas where Congress custom-built bankruptcy law, preemption is more likely because when Congress crafted new, unique provisions, it probably contemplated whether or not to exclude overlapping state law remedial schemes. But in the areas where Congress merely imported existing federal law without any significant change, preemption is improbable because such borrowing does not evidence an intent to change well-settled preemption law.

The issue in this case-remedies for abuse of an adversary proceeding-belongs to the latter category of imported remedial schemes. Graber and the dissent cite Federal Rule of Bankruptcy Procedure 9011 and

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4. "In general, adversary proceedings are more formal and grow ever closer to the litigation mode in other federal courts." 1 COWANS, *supra*, § 3.15.

Bankruptcy Code section 105(a) as evidence that Congress considered the need to remedy abuse of adversary proceedings and decided to exclude state actions for malicious prosecution. But the opposite is true. Congress said very little about remedies for abuse of an adversary proceeding, and what little it said in Rule 9011 and Section 105(a) represents an implicit acceptance of state malicious prosecution claims like Fuqua's.

Bankruptcy Rule 9011, like Federal Rule of Civil Procedure 11, addresses the signing of papers and representations to bankruptcy courts and provides standards for the imposition of sanctions upon both attorneys and parties. *See* FED. R. BANKR.P. 9011; FED.R.CIV.P. 11. Because Rule 9011 is almost identical to Rule 11, courts often merge their substantive analysis of the rules. *See, e.g., Citizens Bank & Trust Co. v. Case (In re Case)*, 937 F.2d 1014, 1022-23 (5th Cir.1991); *In re Commonwealth Sec. Corp.*, No. 06-30746-SGJ-7, 2007 WL 309942 (Bankr.N.D.Tex. Jan. 25, 2007). It is well settled that the Federal Rules of Civil Procedure, including Rule 11, do not preempt malicious prosecution claims predicated on federal civil actions. *See, e.g., U.S. Express Lines*, 281 F.3d at 393; *Cohen v. Lupo*, 927 F.2d 363, 365 (8th Cir.1991); *Tarkowski v. County of Lake*, 775 F.2d 173, 175 (7th Cir.1985); *McShares, Inc. v. Barry*, 266 Kan. 479, 970 P.2d 1005, 1014 (1998) ("Rule 11 can not abridge the substantive state law of malicious prosecution, nor was it adopted to serve as a surrogate for an action based upon a claim of malicious prosecution resulting from frivolous, harassing, or vexatious

litigation."); *Del Rio v. Jetton,* 55 Cal.App.4th 30, 63 Cal.Rptr.2d 712, 716-17 (1997) ("Nothing in [R]ule 11 indicates an intent to occupy the entire field of groundless suits brought for malicious purpose, nor is there any conflict between Rule 11 and a damages action for such malicious prosecution."). As the Rule 11 advisory committee observed, "Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. . . . *Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.*" FED.R.CIV.P. 11 advisory committee's note (emphasis added). Thus, the United States Supreme Court is "confident that district courts will resist the temptation to use [Rule 11] sanctions as substitutes for tort damages." *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.,* 498 U.S. 533, 553, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991).

Despite the fact that Rule 9011 mirrors Rule 11, and that Rule 11 does not preempt malicious prosecutions in normal federal civil actions, Graber still argues that Rule 9011 is evidence of Congress's intent to preempt malicious prosecutions in bankruptcy. The argument must assume that by taking Rule 11-a generic rule of civil procedure that Congress did not intend to have preemptive power, and which the cases hold does not–and placing it in the bankruptcy context, Congress somehow clearly evidenced its intent to give an old rule new preemptive status. This cannot be the case when neither Rule 9011 nor the bankruptcy rules as a whole bear evidence of such a changed intent. Congress did not custom-build this part of bankruptcy law. Instead,

the opposite is true–it intended to import the federal rules framework at large. As the Advisory Committee itself said:

> These [Adversary Proceedings] rules are based on the premise that to the extent possible practice before the bankruptcy courts and the district courts should be the same. These rules either incorporate or are adaptations of most of the Federal Rules of Civil Procedure.

FED. R. BANKR.P. 7001 advisory committee's note. Because Rule 11 does not preempt state malicious prosecution claims normally, and because Congress intended to replicate that framework in bankruptcy adversary proceedings, Rule 9011 does not evidence Congress's intent to preempt malicious prosecution claims. Its importation militates, instead, directly against preemption. *See Bates,* 544 U.S. at 449, 125 S.Ct. 1788 ("If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly."); *Standard Oil Co. of N.J. v. United States,* 221 U.S. 1, 59, 31 S.Ct. 502, 55 L.Ed. 619 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary.").

Likewise, Bankruptcy Code section 105(a) does not evidence Congress's intent to preempt malicious

prosecution claims predicated on conduct in an adversary proceeding. *See* 11 U.S.C. § 105(a). Section 105(a) is another example of where, instead of custom-building a bankruptcy rule, Congress imported general federal law that does not preempt, and said nothing to change that result. Section 105(a) is located in the "General Provisions" chapter of the current Bankruptcy Code. U.S.C., tit. 11, ch. 1. The substance of this section has existed since at least 1898. *See* Laura B. Bartell, *Contempt of the Bankruptcy Court–A New Look*, 1996 U. ILL. L.REV.. 1, 3-4 & n.15 (1996).[5] The section gives bankruptcy courts broad, general police powers:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

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5. The 1898 Act gave the power to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act." Bartell, *supra*, at 4 n. 15.

Appendix A

The United States Supreme Court recognized in *Chambers v. NASCO, Inc.* that federal courts hearing general civil actions possess this same power inherently. 501 U.S. 32, 43-46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). And like Bankruptcy Rule 9011, which Congress imported from federal procedural law at large, section 105(a) is also a direct import. *See Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd., Inc.)*, 40 F.3d 1084, 1089 (10th Cir.1994) ("We believe, and hold, that § 105 intended to imbue the bankruptcy courts with the inherent power recognized by the Supreme Court in *Chambers*.") (citation omitted). The broad *Chambers* power does not preempt malicious prosecution claims in normal litigation, and the mere fact that Congress codified that power for bankruptcy cases did nothing to change its preemptive effect. For the same reasons that merely importing Rule 11 does not evidence Congress's intent to create an exceptional preemption result, importing the power recognized by *Chambers* does not either.

In addition to Rule 9011 and Section 105(a), Graber, the dissent, and cases like *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 915-916 (9th Cir.1996), cite various other Bankruptcy Code provisions in support of preemption. These provisions do not evidence the requisite intent because they address custom-built areas of bankruptcy law, not adversary proceedings, and because they fall far short of evidencing the intent to occupy the *entire field* of sanctions for abuse of adversary proceedings that preemption requires.

Appendix A

Bankruptcy Code section 303 governs the use of involuntary petitions-a unique procedure that allows a person to initiate bankruptcy proceedings without the debtor's consent. 11 U.S.C. § 303(a)-(b). If an involuntary petition is filed in good faith, but dismissed, section 303(i) allows the court to award costs and fees to the debtor. *Id.* § 303(i)(1). If an involuntary petition is filed in bad faith and dismissed, section 303(i) allows the court to award costs, fees, and damages to the debtor. *Id.* § 303(i)(2). Graber and the dissent cite several cases holding that section 303(i) preempts malicious prosecution claims predicated on the filing of an involuntary petition. Indeed, the involuntary petition process is a custom-built area of bankruptcy that Congress crafted anew. *See Miles v. Okun (In re Miles),* 430 F.3d 1083, 1089-91 (9th Cir.2005). Thus, it is more likely that Congress considered the need to deter misuse of the unique involuntary petition process it created, and more likely that it intended section 303(i) to be the exclusive remedy. But the process of filing the initial bankruptcy petition is very different from an adversary proceeding. By its own terms, section 303(i) applies only to the filing of an involuntary petition–it cannot apply to the initiation of an adversary proceeding. *See* 11 U.S.C. § 303. Congress did not custom-build the adversary proceeding rules like it did the involuntary petition process. Instead, for purposes of adversary proceedings, Congress merely imported the existing federal scheme, which allows state malicious prosecution claims.

Bankruptcy Code section 362 establishes another custom-built procedure: bankruptcy's automatic stay, which halts almost all types of creditor's actions against the debtor or the debtor's property. 11 U.S.C. § 362. For willful violations of the automatic stay, section 362(k) mandates the recovery of actual damages in cases of good faith, and punitive damages in "appropriate circumstances." *Id.* § 362(k). Section 362(k) sanctions only violations of the unique automatic stay, conduct that occurs outside of the bankruptcy proceedings. Because the automatic stay is another custom-built area of bankruptcy, its sanctions are more likely to preempt related state claims. But this provision does not evidence a preemptive intent related to adversary proceedings because the two areas–regulating the conduct of persons outside the proceeding and regulating the conduct of litigants inside an adversary proceeding-are so unrelated that an intent to preempt in one cannot evidence an intent to preempt the other.

Bankruptcy Code section 930 allows dismissal of a municipality's bankruptcy petition for "cause." *Id.* § 930. This section is not evidence that Congress considered individual remedies for misuse of the adversarial proceedings because this chapter applies to municipalities, not individual debtors' petitions. *See* U.S.C. tit. 11, ch. 9. In addition, section 930 never addresses the actions of outside parties like Graber; it looks only to the petitioning municipality. *See* 11 U.S.C. § 930.

Bankruptcy Code section 1112 governs dismissal of a Chapter 11 bankruptcy case, as well as conversion of

a Chapter 11 case to another type of bankruptcy case. *Id.* § 1112. Section 1112 is not evidence that Congress considered remedies for misuse of the adversarial process because the dismissal/conversion triggers address the conduct of the bankruptcy petitioner and the well-being of the estate, not the conduct of outside parties like Graber. *See id.* § 1112(b)(4)(a)-(p).[6]

The last provision Graber cites is 28 U.S.C. § 1927, which deals with an attorney's liability for excessive court costs. This statute cannot support preemption of malicious prosecution claims in bankruptcy cases because it cannot be applied by bankruptcy courts. *See Courtesy Inns, Ltd.*, 40 F.3d at 1085-86 ("the bankruptcy court may not impose sanctions under § 1927") (citing *Perroton v. Gray (In re Perroton)*, 958 F.2d 889 (9th Cir.1992)).[7]

Thus, the only broad provisions that apply to adversary proceedings–Rule 9011 and section 105(a)–evidence not an intent to preempt, but rather an intent to preserve the existing framework of federal procedure that does not preempt state malicious prosecution

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6. The 2005 amendments to the Bankruptcy Code moved this provision from 1112(b)(1)-(10) section to section 1112(b)(4)(a)-(p). Pub.L. No. 109-8, § 442(a), 119 Stat. 115 (2005).

7. *But see* 1 COWANS, *supra*, § 3.16. If section 1927 could be applied, it would be analyzed like Rule 11 above, and would not support preemption. *See Fed.R.Civ.P.* 11 advisory committee's note (presuming that malicious prosecution claims will coexist with the imposition of section 1927 sanctions).

claims. In light of the well-established general rule that federal law does not preempt malicious prosecution claims predicated on conduct in federal court, we are unable to find the requisite evidence of an intent to preempt these same claims in bankruptcy.

One final argument concerning Congress's statutory scheme deserves attention. Graber says that allowing malicious prosecution claims may change the incentives for participation in bankruptcy. As the argument goes, a creditor planning on bringing an involuntary proceeding might not do so if the state malicious prosecution claim is available to bankruptcy debtors.[8] Graber says that Congress contemplated the incentives for participation in bankruptcy, and that states ought not be able to alter the balance Congress struck by adding the risk of malicious prosecution. This argument fails for the same reason that the Rule 9011 argument fails. The Federal Rules of Civil Procedure balance incentives and penalties for participation in general federal litigation, and malicious prosecution claims in that context present the same potential to alter litigants' decision-calculus. Yet Congress chose not to preempt the malicious prosecution claim in general federal litigation. To effectuate a change in this result for

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8. Even if litigants actually consider such possibilities, there is good reason to doubt that the addition of a potential malicious prosecution action would have any appreciable effect on their decision calculus, particularly in light of what Graber says is an existing comprehensive remedial scheme. We do not impute to Congress such a strained conclusion without clearer evidence.

bankruptcy, Congress must speak more clearly than it has. For these reasons, Graber's claim that Congress intended to exclude malicious prosecution claims from the field of remedies for abuse of a bankruptcy adversary proceeding fails.

B

Graber next argues that preemption is warranted by the risk of disrupting uniformity in bankruptcy. We disagree for two reasons. First, we think the uniformity argument does not warrant preemption because Fuqua's lawsuit will not necessarily affect the law of bankruptcy, be it in Fuqua's particular case or in bankruptcy cases at large. By definition, Texas claims for malicious prosecution arise only after the underlying case reaches a final judgment and all appeals are exhausted. *See Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 208 (Tex.1996) ("[A]n underlying civil suit has not terminated in favor of a malicious prosecution plaintiff until the appeals process for that underlying suit has been exhausted.").[9] When Fuqua filed his malicious prosecution claim in state court, the bankruptcy court controversy between

9. In Texas, "[t]o prevail in a suit alleging malicious prosecution of a civil claim, the plaintiff must establish: (1) the institution or continuation of civil proceedings against the plaintiff; (2) by or at the insistence of the defendant; (3) malice in the commencement of the proceeding; (4) lack of probable cause for the proceeding; (5) termination of the proceeding in plaintiff's favor; and (6) special damages." *Tex. Beef Cattle*, 921 S.W.2d at 207.

Graber and Fuqua had reached a final, undisturbable result. A judgment had been entered in the adversary proceeding in favor of Fuqua, the judgment had been appealed, the appeal had been dismissed, and the time for filing any further appeals had expired. *See* FED. R. BANKR.P. 9021-24 (providing final judgment rules); 28 U.S.C. § 158 (providing for federal district court jurisdiction over appeals from bankruptcy court final judgments); *Smith v. Seaside Lanes (In re Moody)*, 825 F.2d 81, 85 (5th Cir.1987) ("[I]t is generally held that a separate adversary proceeding within the framework of the overall bankruptcy case is an appropriate 'judicial unit' for determining finality. . . . Thus, even though the bankruptcy case may continue, an order disposing of such a proceeding is appealable as a final order."). Therefore, nothing occurring in the malicious prosecution claim could disturb the matters already decided in Fuqua's adversary proceeding.[10]

Nor can it be said that the adjudication of Fuqua's malicious prosecution claim will affect federal bankruptcy law at large. The element of a malicious prosecution claim that most concerns preemption cases

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10. The dissent argues that the bankruptcy court has issued no final order closing Fuqua's Chapter 7 case and that, therefore, Fuqua could still petition the bankruptcy court for remedies. Even if this was the case, there is no question that the adversary proceeding, which is the basis of the malicious prosecution claim, has closed and that the time for an appeal has expired. Further, Fuqua's claim is not preempted simply because some remedies may be available in federal court. *See Del Rio*, 63 Cal.Rptr.2d at 717; *McShares*, 970 P.2d at 1016.

is probable cause, which Graber says might require state courts to interpret federal law. As the argument goes, a state court can never determine whether there was probable cause to bring an adversary proceeding without impermissibly interpreting federal bankruptcy law. But this is not always the case because state courts can determine that an adversary proceeding was brought without probable cause by interpreting *only state law.* Fuqua's situation illustrates this.

Graber's adversary proceeding alleged that Fuqua committed acts of fraud in a financial transaction. In bankruptcy adversary proceedings, "[t]he validity of a creditor's claim is determined by rules of state law," *Grogan v. Garner,* 498 U.S. 279, 283-84, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991),[11] while issues like

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11. The United States Supreme Court recently reiterated the important role of state substantive law in bankruptcy:

> Indeed, we have long recognized that the basic federal rule in bankruptcy is that state law governs the substance of claims, Congress having generally left the determination of property rights in the assets of a bankrupt's estate to state law. Accordingly, when the Bankruptcy Code uses the word "claim"–which the Code itself defines as a right to payment–it is usually referring to a right to payment recognized under state law. As we stated in *Butner,* [p]roperty interests are created and defined by state law, and [u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.

(Cont'd)

dischargeability are determined by the Bankruptcy Code. *Id.* at 284, 111 S.Ct. 654. Thus, bankruptcy courts first determine whether a claimed act constitutes fraud *under state law,* and if so, they then determine how that act affects dischargeability under federal law. *Id.* at 284 n. 10, 111 S.Ct. 654. Suppose Graber made the following assertions in the adversary proceeding:

Adversary Proceeding Claim Part 1: Under Texas law, Fuqua committed an act of fraud.

Adversary Proceeding Claim Part 2: Because of that fraud, federal law requires that Fuqua's bankruptcy debt not be discharged in manner X for reasons A, B, and C.

To succeed in a later action for malicious prosecution, Fuqua might try to prove there was no probable cause as to Claim Part 2 concerning dischargeability. In that case, the state court would be interpreting federal law. But Fuqua could also win the probable cause element of his state action for malicious prosecution by arguing only the state law elements of Graber's adversary proceeding claim. Fuqua's argument in such a case would look like this:

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Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 451, 127 S.Ct. 1199, 167 L.Ed.2d 178 (2007) (citations and internal quotations omitted). *Cf. Chapman v. Currie Motors, Inc.*, 65 F.3d 78 (7th Cir.1995) (discussing federal jurisdiction over "an adversary proceeding based . . . solely on state law").

Appendix A

> Malicious Prosecution Claim Part 1: I concede Adversary Proceeding Claim Part 2-that if there was an act of state fraud, everything Graber says about federal bankruptcy law is correct.
>
> Malicious Prosecution Claim Part 2: But nonetheless, the adversary proceeding claim was malicious because there was *no probable cause for the predicate state law fraud allegation.*

In the above example, the state court would need only determine if Graber had probable cause as to the act of fraud under state law; it would not have to interpret federal law to adjudicate the malicious prosecution claim. In those kinds of circumstances, state courts could not affect the uniformity of bankruptcy laws. Instead, the state law of fraud would continue to control Fuqua and Graber's fate, both in the bankruptcy proceeding and in the malicious prosecution proceeding. Thus, Fuqua could litigate this suit without ever arguing a matter of federal law. We see no threat to uniformity in that situation.[12]

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12. While Fuqua might later raise an issue of federal law, he has not done so yet, and because his pleadings do not "affirmatively negate the existence of jurisdiction," the trial court was required to deny the plea to the jurisdiction. *See County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex.2002). Thus, even under a standard that required total avoidance of federal law, Fuqua's claim should have survived the plea to the jurisdiction.

The second reason that preemption is not warranted by the risk of disrupting uniformity in bankruptcy is more fundamental: The uniformity argument for preemption is not triggered by the mere fact that a claim requires state courts to interpret federal bankruptcy law. It is true that, "[p]ursuant to Art. I, § 8, cl. 4, of the Constitution, Congress has power to enact bankruptcy laws that are uniform throughout the United States," *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 469, 102 S.Ct. 1169, 71 L.Ed.2d 335 (1982), and that in many places Congress has effectively expressed its intention to exclude states from the business of interpreting bankruptcy law. *See* 28 U.S.C. § 1334(a) (providing for exclusive federal jurisdiction for "cases under [the Bankruptcy Code]"); *Yaquinto v. Segerstrom (In re Segerstrom)*, 247 F.3d 218, 223-24 (5th Cir.2001) ("It has long been established that federal bankruptcy law determines the scope of a debtor's bankruptcy estate." (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-205, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983))). However, the mere existence of Congress's power to enact uniform bankruptcy laws does not require that Congress actually exercise the power to abolish by preemption all disparate state laws affecting bankruptcy. *See Gibbons*, 455 U.S. at 469, 102 S.Ct. 1169. "A bankruptcy law may be uniform and yet 'may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States.' " *Id.* (quoting *Stellwagen v. Clum*, 245 U.S. 605, 613, 38 S.Ct. 215, 62 L.Ed. 507 (1918)). It is precisely because "[b]ankruptcy legislation is superimposed on rights and obligations created by the

laws of the States," *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 170, 67 S.Ct. 237, 91 L.Ed. 162 (1946) (Frankfurter, J., concurring), that "uniformity does not require the elimination of any differences among the States." *Gibbons*, 455 U.S. at 469, 102 S.Ct. 1169 (citing *Vanston*, 329 U.S. at 170, 67 S.Ct. 237 (Frankfurter, J., concurring)). As one court put it, "because the common law of the various states provides much of the legal framework for the operation of the bankruptcy system, it cannot be said that Congress has completely preempted all state regulation which may affect the actions of parties in bankruptcy court." *Miles*, 430 F.3d at 1092; *see also California v. ARC Am. Corp.*, 490 U.S. 93, 105, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989) ("Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law. . . ."); 1 COWANS, *supra*, § 3.2(b) ("[N]ot all state laws which undertake to regulate the debtor-creditor relationship are nullified."). There is no more reason to question a state court's aptitude at applying federal law now than there has been for the last two hundred years. *Cf. Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340, 4 L.Ed. 97 (1816) ("[T]he framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction."); *see also Claflin v. Houseman*, 93 U.S. 130, 142-43, 23 L.Ed. 833 (1876). Because Congress has yet to actually exercise its power to unify this aspect of bankruptcy and suppress the disparate state laws of malicious prosecution, the uniformity argument does not warrant preemption.

III

We are not convinced that the Bankruptcy Code evidences Congress's intent to preempt Fuqua's malicious prosecution claim, and we are not convinced that entertaining Fuqua's malicious prosecution claim will impermissibly interfere with the federal interest in uniform bankruptcy laws. Graber's preemption argument simply fails to fulfill the requirements of any recognized category of preemption. Congress did not specifically express an intent to preempt Fuqua's claim, and it did not create a statutory scheme that impliedly requires as much. Allowing Fuqua's claim to proceed in Texas courts neither conflicts with the federal laws that were expressed, nor does it hinder the advancement of the policies embodied therein. Because Congress was silent on the matter, we see no reason to discontinue state law's historic function of providing common law remedies for misconduct in federal courts. To be sure, "it is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-231, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), and this case is no exception.[13] When faced

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13. Contrary to Graber's suggestion, very few courts have addressed the particular issue confronting the Court today. The vast majority of cases cited by Graber involve involuntary petitions or automatic stays, not adversary proceedings. No matter what these cases say about the custom-built areas of (Cont'd)

withsuch a difficult case, we must err in favor of the states. We affirm the judgment of the court of appeals.

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bankruptcy, they do not control our analysis of preemption in the adversary proceeding context. At least two courts generally oppose preemption of malicious prosecution claims predicated on conduct in bankruptcy. *Paradise Hotel Corp. v. Bank of N.S.*, 842 F.2d 47 (3d Cir.1988); *R.L. LaRoche, Inc. v. Barnett Bank of S. Fla., N.A.*, 661 So.2d 855 (Fla.Dist.Ct.App.1995). While some jurisdictions hold that bankruptcy statutes preempt malicious prosecution claims predicated on the bringing of an adversary proceeding, *see, e.g., MSR Exploration*, 74 F.3d 910 (9th Cir.1996); *Glannon v. Garrett & Assocs., Inc.*, 261 B.R. 259 (D.Kan.2001); *Koffman v. Osteoimplant Tech., Inc.*, 182 B.R. 115 (D.Md.1995); *Lewis v. Chelsea G. C.A. Realty P'ship*, 86 Conn.App. 596, 862 A.2d 368 (Conn.App.Ct.2004); *Ross v. Universal Studios Credit Union*, 95 Cal.App.4th 537, 115 Cal.Rptr.2d 712 (Cal.Ct.App.2002); *Idell v. Goodman*, 224 Cal.App.3d 262, 273 Cal.Rptr. 605 (Cal.Ct.App.1990), the opinions of those jurisdictions do not bind us; nor do the arguments that they have accepted persuade us.

Justice WAINWRIGHT filed a dissenting opinion, in which Justice BRISTER, Justice MEDINA, and Justice WILLETT joined.

Justice WAINWRIGHT, joined by Justice BRISTER, Justice MEDINA, and Justice WILLETT dissenting.

The question posed is whether federal or state law should provide the remedy to a debtor allegedly sued wrongfully in an adversary proceeding in bankruptcy court. The predicate conduct for the adversary proceeding occurred prior to the debtor's filing of the bankruptcy petition, and all of the alleged wrongful conduct occurred in the bankruptcy proceeding. The Court holds that on these facts the debtor may pursue a Texas common law malicious prosecution claim in state court for harm allegedly caused during federal bankruptcy proceedings. Because federal law occupies the field of bankruptcy, and Congress created an analogue in the Bankruptcy Code to malicious prosecution of an involuntary Chapter 11 bankruptcy, but not for the voluntary Chapter 7 bankruptcy at issue here, I would not create a new claim for abuses in Chapter 7 bankruptcies that Congress saw fit not to create. Debtors have adequate recourse for abuse of the bankruptcy process in the Bankruptcy Code and Rules.

I am also concerned that the Court's holding undermines the uniformity mandated for bankruptcy law by the United States Constitution, as under the Court's rationale all fifty states could overlay their state

remedies on the bankruptcy proceedings and multiply the controversy for years beyond the controlled confines of the federal bankruptcy process. I therefore respectfully dissent.

I. Background

In 1988, Richard L. Fuqua, an attorney, filed a voluntary bankruptcy petition under Chapter 7 in the Bankruptcy Court for the Southern District of Texas, McAllen Division. A year later, Thomas Graber and the law firm in which he is a partner, Hopkins & Sutter (referred to collectively as Graber), filed an adversary action in the bankruptcy proceeding on behalf of Sunbelt Savings (Sunbelt) alleging that Fuqua conspired with a client, Richard Aubin, and others to defraud Sunbelt in a pre-petition real estate transaction. Fuqua alleges that during discovery in the adversary proceeding, Graber provided false and intentionally misleading information about him and caused a criminal referral to be made to the United States Department of Justice regarding Fuqua's involvement in the real estate transaction.

The Department of Justice intervened in the adversary proceeding, and the bankruptcy judge stayed the proceeding during the criminal investigation. The investigation resulted in the indictment of Fuqua and Aubin for bank and tax fraud in 1992. In 1993, the bankruptcy court discharged Fuqua's debts, but the adversary proceeding remained pending in the bankruptcy court. After a 1994 trial in the U.S. District Court for the Northern District of Texas, Fuqua was

acquitted of criminal wrongdoing. The civil adversary proceeding resumed upon resolution of the criminal trial. After a three-day trial in 1996, the bankruptcy court granted a directed verdict in favor of Fuqua. The bankruptcy court entered judgment against Sunbelt on May 13, 1997. The U.S. District Court of the Southern District of Texas dismissed Sunbelt's appeal of the bankruptcy judgment on September 8, 1998, and there was no appeal of that dismissal.

On September 7, 2000, Fuqua filed this state malicious prosecution action in the 93rd District Court of Hidalgo County, Texas. Fuqua alleged that Graber "knowingly, maliciously, and wantonly acted without probable cause in initiating or procuring the civil adversary proceeding, as well as the criminal proceeding, against Fuqua." The district court granted Graber's motion for partial summary judgment dismissing the criminal malicious prosecution claim based on the statute of limitations. In his third amended answer, Graber filed a plea to the jurisdiction, arguing that the district court lacked subject matter jurisdiction to hear Fuqua's civil malicious prosecution claim because the claim was preempted by federal bankruptcy law. The district court granted Graber's plea to the jurisdiction and dismissed the suit on November 25, 2002. Fuqua appealed.

The court of appeals held that Fuqua's malicious prosecution claim did not interfere with the bankruptcy court's jurisdiction, and therefore, the state court maintained concurrent jurisdiction unless it was

preempted by the Bankruptcy Code. 158 S.W.3d 635, 646. On the latter point, the court of appeals determined that there was no express preemption language in the Bankruptcy Code and that state jurisdiction was not preempted by federal bankruptcy law. *Id.* Accordingly, the court of appeals reversed and remanded the case for trial. *Id.* at 647.

II. Parties' Arguments

Graber argues the court of appeals erred in holding that Fuqua's malicious prosecution claim was not preempted, complaining that even the court of appeals itself twice recognized that "a majority of courts that have considered the preemptive nature of bankruptcy law in the context of state tort claims alleging violations of the bankruptcy process have found such claims to be preempted." *Id.* at 641, 643-44. According to Graber, federal law preempts Fuqua's claim because section 105 of the Bankruptcy Code and rule 9011 of the Federal Rules of Bankruptcy Procedure provide the only remedies for abuse of the bankruptcy process. Allowing such claims in state court, Graber adds, would undermine the uniformity, free access, and finality Congress intended in the bankruptcy process.

Fuqua counters that Congress did not intend federal bankruptcy law to preempt his state malicious

prosecution claim.[1] He points to a state court's concurrent jurisdiction over claims that do not affect distribution of the debtor's assets. He adds that section 105 and rule 9011 cannot occupy the field of malicious prosecution because they only provide sanctions, not damages, for abuse of the bankruptcy process. Fuqua further argues that under Graber's reasoning, Fuqua is without a remedy for his damages because a malicious prosecution cause of action does not accrue until the appeals process for the underlying suit has been exhausted. Fuqua admits that he did not seek sanctions or any other remedy in the bankruptcy court for the alleged abuse of process, but maintains he could not have pursued a claim against petitioners in bankruptcy court because Sunbelt's appeal of the adversary

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1. The elements to prove a malicious criminal prosecution are: (1) a criminal prosecution commenced against the plaintiff, (2) the defendant initiated or procured that prosecution, (3) the prosecution terminated in the plaintiff's favor, (4) the plaintiff was innocent of the charges, (5) the defendant lacked probable cause to initiate the prosecution, (6) the defendant acted with malice, and (7) the plaintiff suffered damages. *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 792 n. 3 (Tex.2006).

> The elements to prove the malicious prosecution of a civil claim are: (1) the institution or continuation of civil proceedings against the plaintiff, (2) by or at the insistence of the defendant, (3) malice in the commencement of the proceeding, (4) lack of probable cause for the proceeding, (5) termination of the proceeding in the plaintiff's favor, and (6) special damages. *Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 207 (Tex.1996).

proceeding was not dismissed until September 8, 1998, ten years after he filed his bankruptcy petition and five years after his debts were discharged. The record, however, contains no indication that the bankruptcy court issued a final order, and no evidence was presented that the clerk closed the bankruptcy proceeding.

III. Federal Preemption of State Law

Federal preemption of state law is grounded in the Supremacy Clause of the United States Constitution: "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Under the Supremacy Clause, if state law conflicts with federal law, the state law is preempted and "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981). The parties do not argue that federal law preempts state law expressly in this case. 158 S.W.3d at 639. *See Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex.2001). Graber asserts that federal bankruptcy law impliedly preempts state law, either (1) because the scheme of federal regulation is sufficiently comprehensive to support a reasonable inference that Congress left no room for supplementary state regulation (field preemption), or (2) because the state law actually conflicts with federal remedies (conflict preemption). *See id.*

"The purpose of Congress is the ultimate touchstone" in every preemption case. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963). Accordingly, to discern whether Congress manifested a clear intent to preempt state claims arising from abuse of the bankruptcy process, we consider the statute's language and structure, the context of its enactment, and the purpose of the statute as a whole as revealed through our "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Worthy v. Collagen Corp.*, 967 S.W.2d 360, 367 (Tex.1998) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)).

IV. Federal Law Occupies the Field of Bankruptcy and Preempts State Law.

The U.S. Constitution gives Congress alone the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. Congress passed the Bankruptcy Act of 1898 to govern bankruptcies, then overhauled and codified those statutes in 1978, and has since superceded much of the Bankruptcy Code of 1978 in the 1984 and 1986 amendments to the Code. Manuel D. Leal, *The Power of the Bankruptcy Court: Section 105*, 29 S. Tex. L.Rev. 487, 492 (1988). Congress granted jurisdiction over bankruptcy matters to the federal courts by sections 157 and 1334 of title 28 of the United States Code. *Celotex Corp. v. Edwards*, 514 U.S. 300,

307, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995). This jurisdiction is exercised in the first instance by bankruptcy courts, which are divisions of federal district courts. *See Cox v. Zale Del., Inc.*, 239 F.3d 910, 917 (7th Cir.2001).

Filing a bankruptcy petition vests broad and exclusive jurisdiction over the property of the debtor and his estate in the district court, and hence the bankruptcy court. *In re Garnett*, 303 B.R. 274, 277 (E.D.N.Y.2003). Section 541(a)(1) defines the property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). "This definition is unquestionably broad, its main purpose being to 'bring anything of value that the debtors have into the [bankruptcy] estate.' " *Lyon v. Eiseman (In re Forbes)*, 372 B.R. 321, 330-31 (6th Cir.BAP 2007) (alteration in original) (citing *Booth v. Vaughan (In re Booth)*, 260 B.R. 281, 284-85 (6th Cir.BAP 2001)). These broad powers extend to both a debtor's estate and all transfers made within two years before the filing of the bankruptcy petition. *See* 11 U.S.C. §§ 541, 548(a)(1). All legal proceedings against the debtor or his estate are automatically stayed and subjugated to the bankruptcy proceeding. 11 U.S.C. § 362. The disposition of the debtor's property is governed by federal law, although a debtor's property interests are generally "created and defined by state law" unless a federal purpose requires otherwise. *Lyon*, 372 B.R. at 331 (citing *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979)).

In the absence of explicit preemptive language, Congress's intent to supersede state law fully may be inferred when the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," when the Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or when "the object sought to be obtained by federal law and the character of the obligations imposed by it may reveal the same purpose." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982) (citations omitted). This form of preemption is a federal defense to state law claims and implicates choice of law rather than choice of forum.[2] *See Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 391, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986). Graber argues federal bankruptcy law impliedly preempts Fuqua's claims because the state law purports to regulate conduct "in a field that Congress intended the Federal Government to occupy exclusively," *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990), and because the state law "stands as an obstacle to the accomplishment

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2. Under our pleading rules, Graber's assertion of preemption as a plea to the jurisdiction was sufficient to apprise Fuqua of the character of proof he would need to address the preemption issue, whether it be defensive or jurisdictional in nature. TEX.R. CIV. P. 94. *See Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 546 n. 8 (Tex.1991).

and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941).[3] The federal interest in and control of bankruptcy may truly be said to have completely "occupied the field."[4]

A. Congress Authorized the Award of Actual and Punitive Damages, Attorneys' Fees, and Costs to Parties, as Appropriate, for Violation of Bankruptcy Statutes and Rules and Malicious Prosecution in Bankruptcy Proceedings.

Fuqua concedes that an action based on a frivolous or groundless claim could be preempted by the Bankruptcy Code and Rules, but he contends the remedial scheme of the Bankruptcy Code and Rules is inapposite to the purpose and remedies of a malicious prosecution claim. Graber argues Congress intended to supercede state law in this field by designing adequate

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3. Congress has accommodated state police power to a limited degree in bankruptcy proceedings. For example, known as the "police power" exception to the automatic stay, the Bankruptcy Code states that filing a petition does not operate as a stay of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police and regulatory power, other than enforcement of a money judgment. 11 U.S.C. § 362(b)(4).

4. The Court's indication that federal preemption of state law cannot be based on the absence of explicit preemption language in federal law (called "congressional silence") is curious. *See* 279 S.W.3d 610. Both the field and conflict preemption doctrines take effect only when such silence exists.

remedies in section 105 and rule 9011 to deter abuse of the bankruptcy process. Fuqua also concedes that section 105 grants the bankruptcy court broad equitable powers, but urges that the section does not sufficiently address malicious prosecution. According to Fuqua, rule 9011 only addresses frivolous or groundless claims and mirrors Federal Rule of Civil Procedure 11, which has been held not to preempt state law actions for malicious prosecutions in federal court. *See U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 392-93 (3d Cir.2002).

The authority bestowed on bankruptcy courts by federal law arms them with a broad array of remedies to regulate the conduct of parties, issue injunctive relief, and award sanctions and damages for maliciously initiating proceedings. The Bankruptcy Code "provides a comprehensive federal system of penalties and protections to govern the orderly conduct of debtors' affairs and creditors' rights." *E. Equip. & Servs. Corp. v. Factory Point Nat'l Bank*, 236 F.3d 117, 120 (2d Cir.2001). Other courts have concluded that this comprehensive system overrides state law claims for this type of abuse of the bankruptcy process.

"A debtor who believes a filing in bankruptcy is frivolous or a violation of the automatic stay occurred has a comprehensive scheme of remedies available in the federal courts. The existence of this comprehensive scheme precludes collateral attacks on such filings in state courts." *Glannon v. Garrett & Assocs., Inc.*, 261 B.R. 259, 264 (D.Kan.2001) (quoted in *Greene v. Young*, 174 S.W.3d 291, 302 n. 7 (Tex.App.–Houston [1st Dist.]

2005, pet. denied)). Sections 105(a) and 362(k) and rule 9011 provide effective remedies under federal law and authority for bankruptcy courts to enjoin violations of law and to award damages to debtors harmed by bad faith and abusive conduct in bankruptcy proceedings. 11 U.S.C. §§ 105(a), 362(k); FED. R. BANKR.P. 9011(b)-(c).

Section 105(a) empowers bankruptcy courts.

> *The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.* No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or *to prevent an abuse of process.*

11 U.S.C. § 105(a) (emphasis added). Section 105 gave the bankruptcy courts "broad equitable powers to exercise [their] jurisdiction any time there is a threat to the successful rehabilitation of the estate." Manuel D. Leal, *The Power of the Bankruptcy Court: Section 105*, 29 S. TEX. L.REV. 487, 497 (1988) (citing *In re Stuart Glass & Mirror, Inc.*, 71 B.R. 332, 335 (Bankr.S.D.Fla.1987)). The last phrase–"to prevent an abuse of process"–was added in 1986 to affirm that bankruptcy courts may take any action on their own and make any necessary determination to prevent an abuse

of process and expedite bankruptcy cases. *Id.* at n. 219 (citing Senator Orrin Hatch who apparently made the only statement in legislative history concerning the amendment). Under section 105(a), the court may raise the issue of good faith in considering motions of the parties. *Little Creek Dev. Co. v. Commonwealth Mortg. Corp. (In re Little Creek Dev. Co.)*, 779 F.2d 1068, 1071 n. 1 (5th Cir.1986).

Under section 362(k), any individual injured by a willful violation of a stay "shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k) (stating further that a good faith belief limits recovery to actual damages). Although this case does not concern violation of a bankruptcy stay, this section clearly shows that Congress considered the award of actual and punitive damages, in addition to fees and costs, and authorized ordering those awards as appropriate.

Rule 9011, analogous to Fed.R.Civ.P. 11, empowers bankruptcy courts to impose "an appropriate sanction upon the attorneys, law firms, or parties" that have presented to the court pleadings, motions, or "other paper" containing allegations, factual contentions, or claims and defenses that generally have no evidentiary support and are not warranted by existing law.[5]

5. Rule 9011 provides sanctions for frivolous and harassing filings:

(b) Representations to the Court. By presenting to

(Cont'd)

Appendix A

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the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances–

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(Cont'd)

Rule 9011 authorizes the award of reasonable expenses and attorneys' fees, monetary sanctions, or a penalty to the court. FED. R. BANKR.P. 9011(c).

Fuqua asserts that "any sanctions ordered may be payable *solely* to the court and not the party subjected to the frivolous or groundless claim" (emphasis added). He argues this as another reason bankruptcy statutes and rules need to be supplemented by state law to

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(Cont'd)

> (1) How Initiated
>
> (A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b) . . . If warranted, the court may award to the party prevailing on the motions the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.
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> * * *
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> (2) Nature of Sanction: Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated . . . [t]he sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

FED. R. BANKR.P. 9011(b)-(c).

provide recourse to debtors for harm caused them in bankruptcy adversary proceedings. This is incorrect, as the rule authorizes awards of sanctions and damages to parties in the proceeding. Rule 9011(c) expressly states that the court "may award *to the party prevailing* on the motion" reasonable expenses and attorneys' fees. FED. R. BANKR.P. 9011(c)(1)(A) (emphasis added). It also authorizes orders "directing payment *to the movant* of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." *Id.* (c)(2) (emphasis added).

Fuqua's assertion that section 105 does not provide recovery of damages for maliciously bringing proceedings in bankruptcy is likewise off the mark. A number of courts have affirmed that section 105, although widely used for injunctive relief, authorizes the award of "any type of order, whether injunctive, compensative or punitive, as long as it is 'necessary or appropriate to carry out the provisions' " of the Bankruptcy Code. *Hardy v. U.S. (In re Hardy)*, 97 F.3d 1384, 1389 (11th Cir.1996) (citing 11 U.S.C. § 105(a)). *See also McTyeire v. Hunt (In re McTyeire)*, 357 B.R. 898, 903 (Bankr.M.D.Ga.2006). Section 105 authorizes a bankruptcy court to order payment of actual and punitive damages as well as attorneys' fees and costs. *Manion v. Providian Nat'l Bank*, 269 B.R. 232, 241-42 (D.Colo.2001) (affirming the bankruptcy court's order requiring a holder of void deeds of trust to pay actual damages and attorneys' fees in an adversary proceeding); *Moratzka v. Visa U.S.A. (In re Calstar, Inc.)*, 159 B.R. 247, 261 (Bankr.D.Minn.1993) (awarding

money damages for a violation of the automatic stay and stating that punitive damages, although generally available under section 105, were not warranted in the case). Leal, 29 S. TEX. L.REV. at 496.

Section 303(i) also provides a close analogue to a Texas common law malicious prosecution claim, authorizing awards to debtors for reasonable attorneys' fees, costs, and actual or punitive damages when the court dismisses an involuntary petition. 11 U.S.C. § 303(i). Although section 303(i) only applies to involuntary cases, it once again affirms that Congress recognized the wide panoply of available remedies for abuse of process and then associated sanctions and awards with selected violations of the Code and the Rules. Congress provided sanctions for certain violations of Bankruptcy Code provisions, injunctive relief for some, actual damages for others, and punitive damages for a few. The provisions implicated by a debtor's claim of malicious prosecution, section 105 and rule 9011, both provide sanctions and damages upon proper proof.

Because Congress has provided a comparable, if not exact, counterpart in federal bankruptcy law to Fuqua's sought-after remedies, his argument that recoveries in bankruptcy law are woefully inadequate loses considerable steam. The existence of the remedial provisions cited "suggests that Congress has considered the need to deter misuse of the process and has not merely overlooked the creation of additional deterrents." *MSR Exploration,* 74 F.3d at 915 (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 252-54, 113

S.Ct. 2063, 124 L.Ed.2d 161 (1993) (enforcement scheme in ERISA indicates Congress did not forget other remedies) and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) (ERISA remedies preempt others, even if some possible remedies are left out)). If a Texas common law claim packs more wallop than the bankruptcy relief, then Congress presumably intended to provide a more limited remedy for the malicious filing of an adversary proceeding in a voluntary bankruptcy. The fundamental vacancy in Fuqua's argument is the unsubstantiated presumption that bankruptcy laws necessarily must provide equivalent levels of recovery to the state common law claim.

Fuqua contends that, were we to hold his state malicious prosecution claim preempted, he would have no remedy because the bankruptcy court has discharged his debts and no longer has jurisdiction over his case. Section 350(a) states that after the estate is fully administered and the court has discharged the trustee, "the court shall close the case." Further, according to the bankruptcy rules, a court "shall enter *a final decree* closing the case." FED. R. BANKR.P. 3022 (emphasis added).

Neither a discharge of debts nor a dismissal closes the case; on the contrary, a bankruptcy case is not closed, and the bankruptcy court retains jurisdiction, until the final decree is entered on the docket sheet. *See In re Union Home and Indus., Inc.*, 375 B.R. 912, 917 (10th Cir.BAP 2007); *Sherman v. Sec. & Exch. Comm'n (In re*

Sherman), 491 F.3d 948, 967 (9th Cir.2007); *Greenfield Drive Storage Park v. Cal. Para–Prof'l Servs., Inc. (In re Greenfield Drive Storage Park)*, 207 B.R. 913, 918 (9th Cir.BAP 1997); *Singleton v. Countrywide Home Loans, Inc. (In re Singleton)*, 358 B.R. 253, 256 (D.S.C.2006) (holding that dismissal of a bankruptcy case does not deprive the court of jurisdiction; it must be closed); *In re Hasan*, 287 B.R. 308, 311 (Bankr.D.Conn.2002) (holding that a debtor's voluntary dismissal did not close the case and that the bankruptcy court retained jurisdiction to impose sanctions on the debtor); *In re A.H. Robins Co.*, 219 B.R. 145, 149 (Bankr.E.D.Va.1998). *See also* 9 COLLIER ON BANKR. § 5009.01 (15th ed.2006). Once the bankruptcy case is closed, there is no longer a bankruptcy estate, and there can no longer be "related to" jurisdiction. 9 COLLIER ON BANKR. § 5009.01. As such, the bankruptcy court only then loses jurisdiction.

Graber states that there is no order in the record closing Fuqua's Chapter 7 case. Fuqua does not assert that a final order was issued and has presented no evidence that his bankruptcy case was ever closed. *See A.M.S. Printing Corp. v. Wernick (In re Wernick)*, 242 B.R. 194, 196 (Bankr.S.D.Fla.1999); *Edwards v. Sieger (In re Sieger)*, 200 B.R. 636, 639 (Bankr.N.D.Ind.1996). If his case remains open, the bankruptcy court retains jurisdiction, and Fuqua could petition that court for appropriate remedies. Moreover, if the bankruptcy case has in fact been closed, Fuqua could petition the court to reopen it "to accord relief to the debtor." 11 U.S.C. § 350(b). Fuqua has not

persuaded me that he would have no relief in bankruptcy.

Ultimately, Congress, not the state courts, should decide what incentives and penalties are appropriate to address litigation conduct in the bankruptcy proceedings and when those incentives or penalties should be used. *See Gonzales v. Parks*, 830 F.2d 1033, 1036-37 (9th Cir.1987).

B. The Court's Recognition of a State Common Law Malicious Prosecution Claim for Adversary Proceedings Conflicts with Congress's Decision Not to Create Such a Claim for Voluntary Chapter 7 Bankruptcies.

"[B]ankruptcy principles come from federal rather than state law." *Randolph v. IMBS, Inc.*, 368 F.3d 726, 730 (7th Cir.2004) (Easterbrook, J.) (citing *Cox v. Zale Del., Inc.*, 239 F.3d 910, 916 (7th Cir.2001) (Posner, J.)). In bankruptcy, "the debtor's protection and remedy remain[ ] under the Bankruptcy Act." *Kokoszka v. Belford*, 417 U.S. 642, 651, 94 S.Ct. 2431, 41 L.Ed.2d 374 (1974) (holding superceded in part by statute). The "delicate balance of a debtor's protections and obligations during the bankruptcy procedure" have been fixed, modified, overhauled, and set by Congress over more than a century, emanating from explicit constitutional authority to make the bankruptcy laws. *Kokoszka*, 417 U.S. at 651, 94 S.Ct. 2431.

Appendix A

Congress provided a roadway to its intent in the relevant provisions of the Bankruptcy Code. It includes both voluntary and involuntary bankruptcies under Chapters 7 and 11. *See* 11 U.S.C. §§ 301, 303. In section 303, Congress promulgated a statutory analogue to state law malicious prosecution claims for abuse of bankruptcy proceedings in involuntary cases. *Id.* Section 303(i) provides for recovery of "any damages proximately caused," including actual and exemplary damages, by filing an involuntary petition in bad faith. *Id.* By its language, section 303(i) remedies include the damages that may be recovered under Texas common law for malicious prosecution. *See, e.g., Fifth Club, Inc. v. Ramirez,* 196 S.W.3d 788, 798 (Tex.2006) (allowing mental anguish damages); *Ellis County State Bank v. Keever,* 915 S.W.2d 478, 479 (Tex.1995) (discussing sufficiency of the evidence for punitive damages). Courts have consistently held that section 303(i) preempts state law actions for malicious prosecution in involuntary bankruptcy proceedings.[6]

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6. *See Miles v. Okun (In re Miles),* 430 F.3d 1083, 1089 (9th Cir.2005); *Glannon,* 261 B.R. at 264; *Koffman v. Osteoimplant Tech., Inc.,* 182 B.R. 115, 123-28 (D.Md.1995); *Mason v. Smith,* 140 N.H. 696, 672 A.2d 705, 708 (1996); *Sarno v. Thermen,* 239 Ill.App.3d 1034, 180 Ill.Dec. 889, 608 N.E.2d 11, 18 (1992); *Gene R. Smith Corp. v. Terry's Tractor, Inc.,* 209 Cal.App.3d 951, 257 Cal.Rptr. 598, 600 (1989).

> A minority of courts have refused to adopt this reasoning. *See Paradise Hotel Corp. v. Bank of Nova Scotia,* 842 F.2d 47, 52 (3d Cir.1988) (reasoning that because section 303(i) is not available where debtor
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> (Cont'd)

Importantly, for this case and Fuqua's claim, Congress did not similarly create a vehicle for recovery of "all damages proximately caused" or exemplary damages for voluntary Chapter 7 proceedings. Instead, Congress created remedies to recover attorneys' fees and costs as sanctions. The extensive remedial provisions for involuntary petitions indicate that Congress did not ignore but considered sanctions, equitable remedies, and compensatory and exemplary damages in the bankruptcy scheme. *MSR Exploration*, 74 F.3d at 913. Where Congress includes damages provisions in one section of a statute but omits them in another section of the same statute, we presume Congress acted intentionally and purposefully in the disparate inclusion or exclusion *Clay v. U.S.*, 537 U.S. 522, 528, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003); *Duncan*

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has converted a Chapter 7 proceeding to a Chapter 11 proceeding, it cannot be an exclusive remedy for abuse of process and malicious prosecution claims); *R.L. LaRoche, Inc. v. Barnett Bank of S. Fla.*, 661 So.2d 855, 859-64 (Fla.Dist.Ct.App.1995). However, *Paradise Hotel* has been distinguished as the minority view. *See Shiner v. Moriarty*, 706 A.2d 1228, 1238 (Pa.Super.Ct.1998). Further, a subsequent member of the court that issued *R.L. LaRoche* identified the decision's minority status in light of the development of the law in this area and encouraged his court to recede from that position. *Mullin v. Orthwein*, 772 So.2d 30, 31 (Fla.Dist.Ct.App.2000) (Gross, J., concurring) (distinguishing other cases in line with it as not being based on conduct occurring in bankruptcy).

v. Walker, 533 U.S. 167, 173, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001). In this context, Congress's creation of sanctioning tools, albeit broad, rather than damages, speaks loudly to Congress's intent for conduct constituting malicious prosecution in voluntary Chapter 7 proceedings. By allowing Fuqua's Texas common law prosecution claim to proceed for actions that occurred entirely in bankruptcy, the Court, in effect, creates a malicious prosecution claim for voluntary Chapter 7 bankruptcies that Congress saw fit not to create.

There is no provision comparable to a Texas malicious prosecution claim directed specifically at the voluntary filings of a debtor or an adversary proceeding instituted by a creditor. There are, however, many other remedial provisions in the Code that could apply. *See, e.g.*, 11 U.S.C. § 362(k) (willful violation of automatic stays); 11 U.S.C. § 707(b) (dismissal for "substantial abuse"); 11 U.S.C. § 930(a) (dismissal under Chapter 9); 11 U.S.C. § 1112(b) (dismissal under Chapter 11); 28 U.S.C. § 1927 (liability for excessive costs for "unreasonably and vexatiously" multiplying proceedings). And like 303(i), section 362(k) has been held to preempt state law abuse of process claims for violations of an automatic stay. *See E. Equip. & Servs. Corp. v. Factory Point Nat'l Bank*, 236 F.3d 117, 120 (2d Cir.2001) (preemption of jurisdiction); *Periera v. Chapman*, 92 B.R. 903, 908 (C.D.Cal.1988); *Brandt v. Swisstronics, Inc. (In re Shape)*, 135 B.R. 707, 708-09 (Bankr.D.Me.1992); *Koffman*, 182 B.R. at 123-28 (preemption holding based on both section 303(i) and section 362(k)); *Smith v. Mitchell Constr. Co.*, 225

Ga.App. 383, 481 S.E.2d 558, 561 (1997). *See also Halas v. Platek*, 239 B.R. 784, 792 (N.D.Ill.1999) (holding that because a claim for sanctions under section 362(k) is within the exclusive jurisdiction of federal courts, state court lacked subject matter jurisdiction over claim).

The existence of such an extensive remedial scheme indicates congressional intent for bankruptcy law to "occupy exclusively" the regulation of conduct amounting to malicious prosecution or abusive filings in the bankruptcy process. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). An overlay of fifty states' common law claims would damage or interfere with the federal scheme. In addition to the Bankruptcy Code's extensive remedial scheme indicating congressional intent, the constitutionally prescribed need for uniformity in the bankruptcy laws is a special feature that warrants preemption. *Id.*

C. The Required Uniformity of Bankruptcy Laws Mitigates Against Development of State Common Law Claims for Misconduct in Bankruptcy Proceedings.

The Constitution grants Congress the authority to establish "uniform Laws" on the subject of bankruptcies. U.S. CONST. art. I, § 8. Utilizing this power, Congress created comprehensive regulations on the subject of bankruptcy and vested original and exclusive jurisdiction over bankruptcy petitions in the federal district courts. 28 U.S.C. § 1334(a). Allowing state court actions for abuse of the bankruptcy process

conflicts with this goal of uniformity. "[T]he unique, historical, and even constitutional need for uniformity in the administration of the bankruptcy laws is another indication that Congress wished to leave the regulation of parties before the bankruptcy court in the hands of the federal courts alone." *See MSR Exploration*, 74 F.3d at 915.

There are several reasons to preclude these types of state common law claims to ensure the uniformity of bankruptcy law. First, Congress's authorization of certain penalties for frivolous filings in its pervasive promulgation of bankruptcy laws "should be read as an implicit rejection of other penalties, including the kind of substantial damage awards that might be available in state court tort suits." *Gonzales*, 830 F.2d at 1036. Second, the ability to sue parties in bankruptcy in civil proceedings under state law that is inconsistent with the Bankruptcy Code would threaten the uniformity of federal bankruptcy law by potentially affecting parties' rights before the bankruptcy court. *See Gonzales*, 830 F.2d at 1035 (discussing a claim against debtor for maliciously filing a voluntary petition). Third, the threat of being sued in tort in state court could deter persons from exercising their rights in bankruptcy, for instance by making them reluctant to file an adversary proceeding. *See id.* at 1036; *MSR Exploration*, 74 F.3d at 916.

"While it is true that bankruptcy law makes reference to state law at many points, the adjustment of rights and duties within the bankruptcy process itself

is uniquely and exclusively federal." *MSR Exploration*, 74 F.3d at 916. Moreover,

> It is very unlikely that Congress intended to permit the superimposition of state remedies on the many activities that might be undertaken in the management of the bankruptcy process . . . [T]he highly complex laws needed to constitute the bankruptcy courts and regulate the rights of debtors and creditors also underscore the need to jealously guard the bankruptcy process from even slight incursions and disruptions brought about by state malicious prosecution actions.

Id. at 914. Even what may be slight incursions could very well collectively and over time, with fifty different jurisdictions considering them, even in a well-intentioned fashion, undermine the uniformity and objectives of the federal bankruptcy system.

Fuqua argues that Congress intended state law to supplement this area of bankruptcy. I disagree and conclude that, based on the remedial scheme established and the need for uniformity, Congress intended to preempt state common law claims based on malicious proceedings in a bankruptcy case to avoid such claims presenting "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and to avoid undermining the constitutional mandate of "uniform Laws on the subject of

Bankruptcies throughout the United States." *Hines*, 312 U.S. at 67, 61 S.Ct. 399. *See* U.S. CONST. art. I, § 8.

V. Preemption of Jurisdiction

Ordinarily, federal preemption operates as an affirmative defense to a plaintiff's state law claims, but does not deprive a state court of jurisdiction over those claims. *Mills v. Warner Lambert Co.*, 157 S.W.3d 424, 427 (Tex.2005) (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987)). There are, however, situations in which federal law may preempt conflicting state-court jurisdiction. *Longshoremen's*, 476 U.S. at 388, 106 S.Ct. 1904. *See also Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 547 (Tex.1991). State court jurisdiction is affected only when Congress requires that claims be addressed exclusively in a federal forum. *Mills*, 157 S.W.3d at 425 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242-45, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959)). Whether a trial court has subject matter jurisdiction is a legal question we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex.2004); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex.1998).

> It is clearly within Congress' powers to establish an exclusive federal forum to adjudicate issues of federal law in a particular area that Congress has the authority to regulate under the Constitution. Whether it has done so in a specific case is the question

that must be answered when a party claims that a state court's jurisdiction is pre-empted.

Longshoremen's, 476 U.S. at 388, 106 S.Ct. 1904 (citation omitted). *See Mills*, 157 S.W.3d at 427; *Gorman*, 811 S.W.2d at 546. The United States Supreme Court refers to the divesture of state-court jurisdiction by federal law as "*Garmon* preemption." *Longshoremen's*, 476 U.S. at 388-89, 391, 106 S.Ct. 1904.

The bankruptcy courts' jurisdiction is established by sections 157 and 1334 of title 28 of the United States Code. *Celotex*, 514 U.S. at 307, 115 S.Ct. 1493. Section 1334(a) states that "the district courts shall have original and exclusive jurisdiction of all cases under title 11," which refers to the bankruptcy petition itself. *Wood v. Wood (In re Wood)*, 825 F.2d 90, 92 (5th Cir.1987). Section 1334(b) states that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Therefore, although Congress expressed its intent to create an exclusive federal forum with respect to cases "under title 11," "[i]n other matters arising in or related to title 11 cases, unless the Code provides otherwise, state courts have concurrent jurisdiction." *Sanders v. City of Brady (In re Brady, Tex., Mun. Gas Corp.)*, 936 F.2d 212, 218 (5th Cir.1991).

The parties do not dispute that Fuqua's malicious prosecution claim, or the adversary proceeding upon which it is based, is anything more than merely "related to" a title 11 case, as opposed to a case "under title 11."

Thus, this is not the type of case for which Congress provided explicit forum-preempting language. *See, e.g., Mills,* 157 S.W.3d at 427-28 (referring to the holding in *Gorman,* 811 S.W.2d at 547-49, that state courts have no jurisdiction over certain ERISA claims because 29 U.S.C. § 1132(e)(1) provides that "the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter. . . .").

The lack of explicit forum-preempting language regarding Fuqua's claim does not mean, however, that Congress did not intend to establish an exclusive federal forum for claims based on abuse of the bankruptcy process. " '[T]he presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.' " *Mills,* 157 S.W.3d at 428 (quoting *Tafflin v. Levitt,* 493 U.S. 455, 459-60, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990)). For instance, in *Garmon,* the U.S. Supreme Court held that because Congress had enacted such a "complex and interrelated federal scheme of law, remedy, and administration" in the National Labor Relations Act, "due regard for the federal enactment requires that state jurisdiction must yield." 359 U.S. at 243-44, 79 S.Ct. 773 (citation omitted). Similarly, in *Longshoremen's,* the Court held that neither state courts nor federal courts had jurisdiction to hear claims over which Congress intended the National Labor Relations Board to have exclusive jurisdiction. 476 U.S. at 390-91, 106 S.Ct. 1904. But these cases dealt with the unique federal scheme of the National Labor Relations

Act and Congress's intent that both state and federal courts "defer to the exclusive competence of the National Labor Relations Board" to avert "the danger of state interference with national policy." *Longshoremen's*, 476 U.S. at 390, 106 S.Ct. 1904 (quoting *Garmon*, 359 U.S. at 245, 79 S.Ct. 773).

Assuming, as the parties concede, that this claim is "related to" a bankruptcy case, the claim is one of many for which Congress declined to provide exclusive jurisdiction in the federal courts. *See* 28 U.S.C. §§ 1334(b), 157 (establishing the federal courts' original, but not exclusive, jurisdiction over "related to" matters and "core proceedings"). The jurisdictional scheme created by Congress thus prevents me from concluding that Congress intended to create an exclusive federal forum for the claims made in an adversary proceeding. Consequently, only a preemption argument related to the choice of law is viable.

VI. Conclusion

Because Congress created an extensive remedial scheme in the Bankruptcy Code to address abuse of process in bankruptcy proceedings, and because the constitutional goal of "uniform [bankruptcy] laws . . . throughout the United States" could be undermined by allowing state law malicious prosecution actions based on the filing of an adversary proceeding, I would hold that such a claim is preempted by federal bankruptcy law. Preemption operates in this case not to deprive the state court of jurisdiction, but as an affirmative defense

to Fuqua's claims. Congress intended to supersede state law claims for malicious prosecution of the bankruptcy process, not to divest state courts of jurisdiction over such claims. I would affirm the court of appeals' judgment that the district court erred in dismissing this case for lack of subject matter jurisdiction, but I would reverse the court of appeals' judgment that a Texas common law malicious prosecution claim may be predicated on conduct that occurred entirely in the bankruptcy court and which the Bankruptcy Code's extensive remedial and sanction provisions address.

APPENDIX B — OPINION OF THE THIRTEENTH COURT OF APPEALS OF TEXAS, CORPUS CHRISTI-EDINBURG DECIDED MARCH 3, 2005

COURT OF APPEALS OF TEXAS,
CORPUS CHRISTI-EDINBURG.

No. 13-03-135-CV.

Richard L. FUQUA,

Appellant,

v.

Thomas GRABER and Hopkins & Sutter,

Appellees.

March 3, 2005.

Before Justices HINOJOSA, YA NEZ, and CASTILLO.

OPINION

Opinion by Justice YA NEZ.

Appellant, Richard L. Fuqua, filed this malicious prosecution suit in state court against appellees, Thomas Graber, an attorney, and Graber's law firm, Hopkins and Sutter. Fuqua contends that appellees, acting on behalf of a client, Sunbelt Savings, wrongfully filed an adversary proceeding in Fuqua's then-pending

bankruptcy case. Appellees filed a plea to the jurisdiction, contending that because Fuqua's claim is premised on an adversary proceeding in a bankruptcy case, it is preempted by federal bankruptcy law. The trial court granted appellees' plea to the jurisdiction and dismissed Fuqua's claim. In a single issue, Fuqua contends the trial court erred in granting the plea to the jurisdiction. We agree, and reverse and remand to the trial court for proceedings consistent with this opinion.

I. BACKGROUND

In 1987, Fuqua (also an attorney) represented a purchaser in a transaction to purchase a horse farm in Kentucky. To finance the purchase, Fuqua's client and several associates structured a separate real estate transaction designed to generate excess funding in an amount equal to the purchase price of the horse farm.

In 1988, for reasons unrelated to the horse-farm transaction, Fuqua filed for bankruptcy. In 1989, appellees (representing Sunbelt) filed an adversary proceeding in Fuqua's bankruptcy case, alleging fraud in connection with the horse-farm transaction. Fuqua alleges that appellees provided false and misleading information about him to the Justice Department and that they participated in a criminal referral to the Justice Department. The Justice Department began investigating the allegations and intervened in the adversary proceeding. As a result, the bankruptcy judge stayed any actions by Fuqua in the adversary proceeding

pending completion of the investigation. The criminal investigation resulted in Fuqua's indictment in 1992. Between his indictment in 1992 and his 1994 trial (in which he was acquitted of any criminal wrongdoing), Fuqua was discharged by the bankruptcy court in 1993 and his bankruptcy case was closed. The adversary proceeding remained pending in the bankruptcy court. Following Fuqua's acquittal on the criminal charges, the adversary proceeding went to trial. The bankruptcy court granted a directed verdict in Fuqua's favor in the adversary proceeding and judgment was entered in his favor on May 13, 1997.

In September 2000, Fuqua filed this suit for malicious prosecution in state district court. Appellees filed a plea to the jurisdiction, contending that because Fuqua's claim was premised on the prior adversary proceeding, it was preempted by federal bankruptcy law. Following a hearing,[1] the trial court granted appellees' plea to the jurisdiction and dismissed the suit. Fuqua filed a motion for new trial, which the trial court denied. This appeal ensued.

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1. The trial court set a hearing on appellees' plea to the jurisdiction for November 25, 2002. On November 12, 2002, Fuqua filed a motion for continuance on grounds that he was scheduled to be in trial in another case on that date and was unable to attend the hearing. The trial court denied Fuqua's motion for continuance and proceeded with the hearing in his absence. No record of the hearing is included in the record before us. Following the trial court's granting of appellees' plea and dismissal of the case, Fuqua filed a motion for new trial, arguing that he was denied an opportunity to be heard. The trial court denied the motion.

II. STANDARD OF REVIEW

Whether a trial court has subject-matter jurisdiction is a legal question that we review *de novo*.[2] When reviewing a trial court order dismissing a cause for want of jurisdiction, Texas appellate courts "construe the pleadings in the plaintiff's favor and look to the pleader's intent."[3]

The purpose of a plea to the jurisdiction is to defeat a cause of action without regard to whether the claims asserted have merit.[4] "In deciding a plea to the jurisdiction, a court may not weigh the claims' merits but must consider only the plaintiffs' pleadings and the evidence pertinent to the jurisdictional inquiry."[5] The court must presume in favor of jurisdiction unless lack of jurisdiction affirmatively appears on the face of the petition.[6] If a claim is not within a court's jurisdiction, and the impediment to jurisdiction cannot be removed, then it must be dismissed.[7]

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2. *State v. Gonzalez*, 82 S.W.3d 322, 327 (Tex.2002); *see also Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex.2002).

3. *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex.2002); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex.1993).

4. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex.2000).

5. *Brown*, 80 S.W.3d at 555.

6. *Peek v. Equip. Serv. Co.*, 779 S.W.2d 802, 804 (Tex.1989).

7. *Am. Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 805 (Tex.2001).

Appendix B

III. ANALYSIS

A. Fuqua's Pleadings

"To prevail in a suit alleging malicious prosecution of a civil claim, the plaintiff must establish: (1) the institution or continuation of civil proceedings against the plaintiff; (2) by or at the insistence of the defendant; (3) malice in the commencement of the proceeding; (4) lack of probable cause for the proceeding; (5) termination of the proceeding in plaintiff's favor; and (6) special damages."[8]

We begin by addressing the allegations in Fuqua's pleadings. In his second amended petition, Fuqua alleges that appellees "knowingly, maliciously, and wantonly acted without probable cause in initiating" a civil adversary proceeding against him. He contends that during the course of the proceeding, appellees provided false and misleading information to the Justice Department, which eventually resulted in his indictment for bank fraud and tax fraud. He also alleges appellees acted maliciously in initiating a criminal proceeding against him as an adjunct to the civil proceeding. Fuqua contends that the civil and subsequent criminal actions were all terminated in his favor. Fuqua alleges that as a result of appellees' conduct, he suffered damages in the form of injury to his reputation and costs associated with his defense. He alleges he suffered special damages in

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8. *Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 207-08 (Tex.1996).

that as a result of appellees' conduct, he was indicted and subsequently tried for bank fraud.[9] We conclude Fuqua has alleged a cause of action for malicious prosecution based on appellees' allegedly improper conduct in Fuqua's bankruptcy proceeding.

B. Preemption

The issue before us is apparently one of first impression in Texas: whether Fuqua's claim for malicious prosecution is preempted by federal bankruptcy law. Appellees contend federal law preempts Fuqua's claim "by implication."

Federal preemption of state law causes of action is appropriate if Congress expressly legislates such preemption, or if Congressional intent can be implied from the federal legislation.[10] If Congress has legislated comprehensively and occupied an entire field of regulation, leaving no room for supplemental state

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9. We are mindful of our limited role here. Our task is not to determine whether the plaintiff ultimately wins or loses on judicial review; rather, this Court's task is to examine the facts pleaded and to determine whether those facts support jurisdiction in the trial court. *See Univ. of Tex. Med. Branch v. Hohman*, 6 S.W.3d 767, 771 (Tex.App.-Houston [1st Dist.] 1999, pet. dism'd w.o.j.).

10. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990).

regulation, preemption is implied.[11] State law is also preempted to the extent it actually conflicts with federal law or interferes with the accomplishment and execution of Congressional objectives.[12] Appellees argue that the bankruptcy code includes remedial provisions and sanctions designed to deter and punish improper use of the bankruptcy process. Because Fuqua's claim alleges improper use of the bankruptcy courts to file and prosecute an adversary proceeding, appellees argue the extensive scheme of remedies in the bankruptcy code preempts his state law claim.

Although Congress has given the federal district courts "original and exclusive jurisdiction of all cases *under* title 11,"[13] the district courts do not have "exclusive jurisdiction of all civil proceedings *arising under* title 11 or *arising in or related to* cases under title 11."[14] Thus, the district courts and their bankruptcy units have exclusive jurisdiction only over "the

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11. *See id.* at 79, 110 S.Ct. 2270; *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000) (stating when Congress intends federal law to "occupy the field," state law in that area is preempted).

12. *English*, 496 U.S. at 79, 110 S.Ct. 2270.

13. The law relating to bankruptcy is codified and enacted as title 11 of the United States Code. *See generally* 11 U.S.C. § 101 (2004).

14. *See* 28 U.S.C.A. §§ 1334(a), (b) (West 2004) (emphasis added); *In re Brady, Mun. Gas Corp.*, 936 F.2d 212, 218 (5th Cir.1991); *see also In re Epstein*, 314 B.R. 591, 599-600 (Bkrtcy.S.D.Tex.2004).

bankruptcy petition itself."[15] In other matters "arising in" or "related to" title 11 cases, unless the bankruptcy code provides otherwise, state courts have concurrent jurisdiction.[16]

This Court has previously held that "the mere pendency of a bankruptcy action does not automatically deprive a State court of all jurisdiction."[17] "In order to preclude a State court's jurisdiction, the state claim must interfere with the jurisdiction of the Bankruptcy Court."[18] In *Dunn*, we held that a trial court did not err in failing to abate a state court action because of the pendency of a bankruptcy where the bankruptcy was concluded sixteen months *before* the trial of the state action and *before* the hearing on the plea in abatement.[19]

Here, Fuqua was discharged by the bankruptcy court in 1993. Judgment was entered in Fuqua's favor in the adversary proceeding on May 13, 1997. Sunbelt appealed and the appeal was dismissed on September 8, 1998. Thus, Fuqua's cause of action for malicious prosecution did not become final until September 8,

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15. *See In re Wood*, 825 F.2d 90, 92 (5th Cir.1987).

16. *In re Brady*, 936 F.2d at 218; *In re Epstein*, 314 B.R. 591 at 599-600 (quoting *Brady*).

17. *Dunn v. Menassen*, 913 S.W.2d 621, 623 (Tex.App.–Corpus Christi 1995, writ denied).

18. *Id.* at 624.

19. *Id.*

1998, when the appeals process in the adversary proceeding was exhausted.[20] Thus, Fuqua's malicious prosecution claim did not accrue until five years *after* he was discharged in bankruptcy.[21]

We conclude that Fuqua's state law claim for malicious prosecution cannot interfere with the bankruptcy court's jurisdiction and that the state court's jurisdiction is therefore not precluded.[22]

We have found no Texas or Fifth Circuit authority directly addressing whether state claims for malicious prosecution are preempted by the bankruptcy code. In support of their argument in favor of preemption, appellees urge us to adopt the reasoning and holdings in: *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 916 (9th Cir.1996); *Gonzales v. Parks*, 830 F.2d 1033, 1035 (9th Cir.1987); *Miles v. Okun (In re Miles)*, 294 B.R. 756, 761 (9th Cir. BAP 2003); *Glannon v. Garrett & Assoc.*, 261 B.R. 259, 266 (D.Kan.2001); *Ross v. Universal Studios Credit Union*, 95 Cal.App.4th 537,

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20. *See Tex. Beef Cattle Co.*, 921 S.W.2d at 208 (holding that "an underlying civil suit has not terminated in favor of a malicious prosecution plaintiff until the appeals process for that underlying suit has been exhausted.").

21. *See id.* at 207-08 (holding termination in plaintiff's favor is element of cause of action for malicious prosecution); *see also Toranto v. Wall*, 891 S.W.2d 3, 6 (Tex.App.–Texarkana 1994, no writ) (noting that cause of action for malicious prosecution accrues when underlying civil suit terminates).

22. *See Dunn*, 913 S.W.2d at 623-24.

115 Cal.Rptr.2d 712 (2002); *Pauletto v. Reliance Ins. Co.*, 64 Cal.App.4th 597, 75 Cal.Rptr.2d 334 (1998); and *Shiner v. Moriarty*, 706 A.2d 1228, 1238 (Pa.Super.1998).

Appellees rely on several grounds for their contention that state law claims for malicious prosecution are preempted by the bankruptcy code. First, "Congress has expressed its intent that bankruptcy matters be handled in a federal forum by placing bankruptcy jurisdiction exclusively in the district courts as an initial matter."[23] "The fact that federal courts have exclusive jurisdiction over bankruptcy matters indicates Congressional intent to preempt state remedies."[24] Second, the comprehensive nature of the bankruptcy code "demonstrates Congress's intent to create a whole system under federal control which is designed to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike."[25] "Congress'[s] authorization of certain sanctions for the filing of frivolous bankruptcy petitions should be read as an implicit rejection of other penalties, including the kind of substantial damage awards that might be available in state court tort suits."[26] Third, preemption

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23. *Glannon v. Garrett & Assoc.*, 261 B.R. 259, 264 (D.Kan.2001) (quoting *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 913 (9th Cir.1996)).

24. *See id.*

25. *Id.* (quoting *MSR Exploration*, 74 F.3d at 913).

26. *Id.* at 264-65 (quoting *Gonzales v. Parks*, 830 F.2d 1033, 1036 (9th Cir.1987)).

of state law malicious prosecution claims furthers Congress's policy of creating uniformity in the bankruptcy code. "[T]he unique, historical, and even constitutional need for uniformity in the administration of the bankruptcy laws is another indication that Congress wished to leave the regulation of the parties before the bankruptcy court in the hands of the federal courts alone."[27] Finally, "allowing state court remedies for wrongful filings could discourage entry into the bankruptcy system."[28]

We recognize that a majority of courts that have considered the preemptive nature of bankruptcy law in the context of state tort claims alleging violations of the bankruptcy process have found such claims to be preempted.[29]

In *Gonzales*, the Ninth Circuit held that a state court lacked subject matter jurisdiction to hear a claim that a debtor's filing of a voluntary bankruptcy petition was

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27. *Id.* at 265 (quoting *MSR Exploration*, 74 F.3d at 915).

28. *Id.* (citing *Gonzales*, 830 F.2d at 1036 ("Even the mere possibility of being sued in state court could in some instances deter persons from exercising their rights in bankruptcy.")).

29. *See, e.g., MSR Exploration*, 74 F.3d at 916; *Gonzales*, 830 F.2d at 1035; *Miles v. Okun (In re Miles)*, 294 B.R. 756, 761 (9th Cir. BAP 2003); *Glannon*, 261 B.R. at 266; *Ross v. Universal Studios Credit Union*, 95 Cal.App.4th 537, 115 Cal.Rptr.2d 712 (2002); *Pauletto v. Reliance Ins. Co.*, 64 Cal.App.4th 597, 75 Cal.Rptr.2d 334 (1998); *Shiner v. Moriarty*, 706 A.2d 1228, 1238 (Pa.Super.1998).

an abuse of process.[30] In *Gonzales*, the plaintiffs defaulted on an obligation, and the defendants sought to foreclose a deed of trust on their property.[31] Plaintiffs filed a voluntary bankruptcy petition, halting the sale.[32] The defendants filed an action in state court, claiming that the plaintiffs' bankruptcy filing was an abuse of process.[33] After the state court granted a default judgment against the plaintiffs, they filed an adversary proceeding in the bankruptcy court, seeking relief from the state court judgment.[34] The bankruptcy court declared the state court judgment void as violative of the automatic stay provision of the bankruptcy code.[35] On appeal, the Ninth Circuit held the state judgment was void because the grant of exclusive jurisdiction to federal courts over bankruptcy petitions precluded collateral attacks on such petitions in state courts.[36] Thus, unlike the present case, the state court action at issue in *Gonzales* was instituted during the pendency of the bankruptcy.[37]

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30. *Gonzales*, 830 F.2d at 1035.

31. *Id.* at 1033.

32. *Id.*

33. *Id.* at 1033-34.

34. *Id.*

35. *Id.*

36. *Id.* at 1035.

37. *Id.* at 1033-34.

Appendix B

In *MSR*, certain creditors of MSR filed claims against it in MSR's bankruptcy proceeding.[38] The bankruptcy court disallowed the creditors' claims.[39] After MSR's reorganization plan was confirmed, it brought a claim for malicious prosecution in federal district court, based on the creditors' disallowed claims.[40] Citing *Gonzales*, the Ninth Circuit held that MSR's claim for malicious prosecution was preempted by the bankruptcy code and should have been brought in the bankruptcy court itself, not as a separate action.[41]

In *Miles*, a bankruptcy panel for the Ninth Circuit held that section 303(i)[42] of the bankruptcy code, which provides for fees, costs, and damages to be awarded against a bad-faith involuntary petitioner, preempts state tort actions premised on the filing and prosecution of involuntary bankruptcies.[43] In *Miles*, a feud between neighbors resulted in the filing of involuntary bankruptcy petitions against the alleged debtors.[44] The bankruptcy court ruled that one of the petitions was filed in bad faith, dismissed the petitions, and awarded

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38. *MSR Exploration*, 74 F.3d at 912.

39. *Id.*

40. *Id.*

41. *Id.* at 916.

42. *See* 11 U.S.C. § 303(i) (2005).

43. *Miles*, 294 B.R. at 762-63.

44. *Id.* at 758.

costs and attorneys' fees to the alleged debtors.[45] After the petitions were dismissed, one of the alleged debtors and her children filed tort actions in state court seeking damages for the filing and prosecution of the involuntary petitions.[46] After the defendants removed the actions to bankruptcy court, the bankruptcy court dismissed the complaints, holding that the plaintiffs' claims were preempted by section 303(i) of the bankruptcy code.[47] The Ninth Circuit panel affirmed the dismissal of the plaintiffs' state law claims.[48] The court held that the plaintiffs' claims for damages were "inextricably part of the parent bankruptcy case."[49] Thus, we find the circumstances in *Miles*, where the plaintiffs were seeking state tort damages *in addition to* the fees and costs already awarded by the bankruptcy court for the bad-faith filing of involuntary petitions, distinguishable from the present case.

Following the Ninth Circuit's decisions in *Gonzales* and *MSR*, a California appellate court held, in *Pauletto*, that the plaintiffs' state law claims for malicious prosecution (based on allegedly malicious filings in a bankruptcy proceeding) were preempted by federal

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45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 762.

bankruptcy law.[50] In that case, the Paulettos, owners of a construction business, filed a voluntary bankruptcy proceeding.[51] The Paulettos' sureties filed an adversary proceeding for a determination that the Paulettos' indebtedness to them was not dischargeable.[52] The bankruptcy court entered judgment in favor of the Paulettos.[53] The Paulettos then filed suit in state court for malicious prosecution and abuse of process based on the allegedly improper filing of the adversary proceeding.[54] The state court held that it lacked subject matter jurisdiction over the Paulettos' claims.[55] The California appellate court affirmed, holding that "no authorized bankruptcy proceeding can properly support a state-law claim for malicious prosecution or abuse of process."[56] The *Pauletto* court noted that "[t]he essential preemption question is not whether the particular state-law remedy the Paulettos seek could be obtained in bankruptcy court, but whether the availability of other remedies under the federal scheme precludes their pursuit of a state-law remedy outside the bankruptcy

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50. *See Pauletto*, 64 Cal.App.4th at 605-06, 75 Cal.Rptr.2d 334.

51. *Id.* at 599, 75 Cal.Rptr.2d 334.

52. *See id.*

53. *See id.*

54. *See id.* at 603, 75 Cal.Rptr.2d 334.

55. *Id.* at 600, 75 Cal.Rptr.2d 334.

56. *Id.* at 605, 75 Cal.Rptr.2d 334.

system."[57] It is unclear in *Pauletto* whether the Paulettos' bankruptcy proceeding was already dismissed when they filed their claim in state court for malicious prosecution.[58] We recognize, however, that the *Pauletto* court's holding did not address whether any remedy remained available to the Paulettos. Rather, the court held, without qualification, that "[a] party aggrieved by bad faith and malicious filings in bankruptcy court is limited to the remedies provided by the Federal Bankruptcy Code and the Federal Rules of Bankruptcy Procedure."[59]

In *Ross*, another California appellate court, addressing a matter "on all fours with *Pauletto*," held that the appellant's state-law claims of malicious prosecution were preempted by federal bankruptcy law.[60] After Ross filed for bankruptcy, a creditor filed an adversary proceeding requesting a determination that its judgment against him be declared nondischargeable.[61] After the bankruptcy court granted judgment in Ross's favor, he sued in state court alleging malicious prosecution and abuse of process based on the bankruptcy court's judgment.[62] The state trial court held

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57. *Id.* at 606, 75 Cal.Rptr.2d 334.

58. *See id.* at 599, 75 Cal.Rptr.2d 334.

59. *Id.* at 606, 75 Cal.Rptr.2d 334.

60. *See Ross*, 95 Cal.App.4th at 539, 115 Cal.Rptr.2d 712.

61. *Id.*

62. *Id.*

it had no jurisdiction and the appellate court affirmed.[63] The *Ross* court held that Ross's remedy was "limited to such satisfaction afforded to him in the bankruptcy court."[64] The court further noted that "Ross chose not to invoke the remedies available to him in the bankruptcy court and he may not circumvent them by filing a malicious prosecution action in state court."[65]

In *Shiner*, the Pennsylvania Superior Court held that the Shiners' state law claims, based on the defendants' allegedly improper filings in the bankruptcy court, were preempted by federal law.[66] The *Shiner* court concluded that "[t]he Bankruptcy Code permits no state law remedies for abuse of its provisions."[67]

In *Glannon*, a Kansas federal district court held that the plaintiff's state law malicious prosecution and abuse of process claims, based on the filing of an involuntary bankruptcy petition, the filing of an adversary proceeding, and the violation of an automatic stay, were preempted by the bankruptcy code.[68]

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63. *Id.* at 538-39, 115 Cal.Rptr.2d 712.

64. *Id.* at 542, 115 Cal.Rptr.2d 712.

65. *Id.*

66. *Shiner*, 706 A.2d at 1238.

67. *See id.*

68. *See Glannon*, 261 B.R. at 265.

Appendix B

In addition to the cases cited by appellees, we note that a majority of courts that have considered the preemptive nature of bankruptcy law in the context of state tort claims alleging violations of the bankruptcy process have found such claims to be preempted.[69] In contrast, only a few courts have held that the bankruptcy code permits state law remedies for abuse of its provisions.[70]

In *Mullin,* the Florida District Court of Appeals relied on its decision in *R.L. LaRoche, Inc. v. Barnett Bank of South Florida,* 661 So.2d 855, 857 (Fla.Dist.Ct.App.1995) (holding state courts had jurisdiction to hear and determine debtor's state law claims related to alleged bad faith filing of an involuntary bankruptcy petition), in holding that the state court had jurisdiction to consider Mullin's malicious prosecution claim following the bankruptcy court's dismissal of an involuntary petition for bankruptcy filed against her.[71] After an involuntary bankruptcy petition was filed against her, Mullin sought a dismissal of the petition

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69. *See, e.g., Lewis v. Chelsea G.C.A. P'ship, L. P.,* 86 Conn.App. 596, 604, 862 A.2d 368 (2004) (citing cases); *see also Mullin v.Orthwein,* 772 So.2d 30, 32-33 (Fla.Dist.Ct.App.2000) (per curiam) (Gross, J., concurring) (citing cases, noting that "judicial landscape in this area of law has considerably developed.").

70. *See, e.g., Mullin,* 772 So.2d at 34-35 (listing cases); *see also Powell v. Wash. Land Co., Inc.,* 684 A.2d 769, 772 n. 9 (D.C.1996) (listing cases).

71. *Mullin,* 772 So.2d at 30.

from the bankruptcy court, but did not request or plead for punitive damages or any other damages associated with the bad-faith filing of the petition, other than for attorneys' fees and costs.[72] The bankruptcy court dismissed the petition, stating it had been prosecuted "in bad faith and for an inappropriate purpose."[73] Mullin filed a malicious prosecution complaint in state court, seeking damages associated with the bad-faith filing of the petition.[74] The defendants moved for summary judgment, contending the state court lacked jurisdiction due to federal preemption of Mullin's claims.[75] The trial court granted summary judgment in favor of the defendants, based on its finding that Mullin's "claims were available in the previous bankruptcy action."[76] Relying on its holding in *LaRoche,* the Florida Court of Appeals reversed the summary judgment.[77] In a separate concurring opinion, Justice Gross noted that since the court's decision in *LaRoche,* the majority of courts considering the issue have held in favor of preemption.[78] Justice Gross concluded by expressing his preference

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72. *Id.* at 32 (Gross, J., concurring).

73. *Id.* at 31.

74. *Id.*

75. *Id.*

76. *Id.* at 32.

77. *Mullin,* 772 So.2d at 30.

78. *Id.* at 32-33 (Gross, J., concurring).

that the court "recede from [its] decision in *LaRoche* and hold that Mullin's state tort law claim is preempted by the Bankruptcy Code."[79]

LaRoche involved facts very similar to those in *Mullin:* following the bankruptcy court's dismissal of an involuntary bankruptcy petition filed against LaRoche (the debtor), it filed suit in state court for malicious prosecution arising from the filing of the petition.[80] The trial court dismissed the claims on the grounds that the bankruptcy court had exclusive jurisdiction over such claims.[81] After noting that there is "no clear authority in the federal courts directly on point,"[82] the *LaRoche* court questioned some of the arguments supporting preemption. In response to the argument that state court adjudication of malicious prosecution claims would impair the right of access to the bankruptcy court, the court noted that it could not discern "how *Gonzales* concluded that *good faith* petitioners would also be discouraged by state court adjudications of bad faith."[83] The court continued:

> It is not immediately obvious to us how damage awards against creditors who have

79. *Id.* at 35.

80. *LaRoche*, 661 So.2d at 857.

81. *Id.*

82. *See id.* at 859.

83. *Id.* at 862 (emphasis in original).

filed involuntary petitions in bad faith–which we take to mean dishonestly and without any pretense of a legal and factual basis for so doing–would deter creditors who have a good faith basis in law and fact to seek such relief. Concededly, such awards would dissuade bad faith creditors, but that seems a result that Congress itself intended. After all, section 303(i)(2) quite specifically allows the bankruptcy court to assess costs, fees and punitive damages against a creditor whom the court has found to have filed an involuntary petition in bad faith. It is thus indisputable that Congress contemplated, at least to that extent, to engage in some deterrence of bad faith involuntary filings.

All creditors who contemplate filing an involuntary petition under section 303, therefore, already face the prospect that a court may determine that they acted in bad faith. *Gonzales* did not explain why bankruptcy court adjudications of bad faith filings under section 303(i)(2) would not hinder good faith creditor access, but that state court adjudications would necessarily do so. Stated conversely, it is not immediately apparent how the prospect of state courts doing what the bankruptcy courts already can do might deter good faith filers. We are simply unable to

> discern a rationale for the dictum in *Gonzales*.[84]

In response to the argument that the need for uniformity in the administration of bankruptcy laws reflects Congress's intent to leave the regulation of parties before the bankruptcy court in the hands of the federal courts alone, the court noted that

> Congress may simply have believed that any resulting mosaic [of jurisprudence], an inevitable feature of our system under the Tenth Amendment, is not necessarily undesirable.... It is not far-fetched to assume that Congress intended that the several states be free to punish [creditors who have abused the system] under their own laws, in their own courts. And, in any event, there is a single overseer for the system in the United States Supreme Court, which can always narrow such causes of action to specific elements and proof if state decisions have the effect of interfering with the primacy of federal bankruptcy law.[85]

Finally, the *LaRoche* court noted that "[t]he Supreme Court has long applied a rebuttable presumption that, when Congress is silent on whether federal court jurisdiction is exclusive, state courts have

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84. *Id.*

85. *Id.* at 863.

concurrent jurisdiction of claims arising under federal law."[86] Thus, the *LaRoche* court concluded that "because there is no express grant of exclusive jurisdiction for these claims to the bankruptcy court and no strong reason to suppose that Congress gave such power by implication," the state court therefore has jurisdiction over state law claims for malicious prosecution based on the bad-faith filing of an involuntary petition.[87]

We recognize that the *LaRoche* court's analysis turns primarily on the question of *jurisdiction*, in contrast to the issue of *preemption*. We emphasize that several courts have accurately noted the distinction. In *Shiner*, the court stated:

> The trial court concluded that the wrongful use of process claim for damages resulting from the filing of certain papers in the U.S. Bankruptcy Court was properly brought in state court. Opinion, dated May 21, 1997, at 10-11. We must first note that the trial court has misstated the issue. The issue is not whether the trial court could exercise *jurisdiction* over the controversy. Rather, the issue is *whether the application of state tort law to the particular issue was pre-empted by the Bankruptcy Code*. . . . The issue is whether a wrongful use claim exists, or is it

86. *Id.*

87. *Id.* at 864.

pre-empted by the remedies available under the Bankruptcy Code.[88]

Similarly, in *Pauletto*, the California Court of Appeals noted:

The issue before us is not whether the *jurisdictional* language of section 1334 of title 28 of the United States Code technically or theoretically would allow a state court malicious prosecution claim based on an underlying bankruptcy proceeding, *but whether allowance of such a claim conflicts with the Bankruptcy Code's overall scheme of remedies* and threatens Congress's objectives of uniformity in bankruptcy law and exclusive federal jurisdiction over bankruptcy proceedings. The *general jurisdictional provisions of section 1334 of title 28 of the United States Code are immaterial to our implied preemption analyses* based on *Gonzales, Gene R. Smith Corp.* [*v. Terry's Tractor, Inc.*], [209 Cal.App.3d 951, 257 Cal.Rptr. 598 (1989)] *Idell* [*v. Goodman*], [224 Cal.App.3d 262, 273 Cal.Rptr. 605 (1990)] *Koffman* [*v. Osteoimplant Technology, Inc.*], [182 B.R. 115 (1995)] and *MSR Exploration, Ltd.*[89]

The narrow issue before us in the present case is whether the trial court erred in: (1) holding that it lacked jurisdiction over Fuqua's claim for malicious prosecution

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88. *Shiner*, 706 A.2d at 1237 (emphasis added).

89. *Pauletto*, 64 Cal.App.4th at 606, 75 Cal.Rptr.2d 334 (emphasis added).

because such claims are preempted by federal bankruptcy law; and (2) dismissing his claim. As noted above, Fuqua's malicious prosecution claim did not accrue until five years after he was discharged in bankruptcy. Relying on our holding in *Dunn*, we have concluded that Fuqua's malicious prosecution claim could not have interfered with the bankruptcy court's jurisdiction, and that the state court's jurisdiction is therefore not precluded.[90] Thus, the state court has jurisdiction over Fuqua's malicious prosecution claim *unless* we determine that it is preempted by the bankruptcy code.

In the absence of any binding authority, on the facts of the present case, we decline to speculate that Congress intended Fuqua's claim for malicious prosecution to be preempted by federal bankruptcy law. We agree with the *LaRoche* court that "the mere fact that Congress might have decided to allow bankruptcy court monetary awards against creditors who file in bad faith does not necessarily produce the conclusion that Congress intended to give these claims exclusively to the bankruptcy courts."[91] We also share the *LaRoche* court's view that "[i]f [our] reading of the bankruptcy jurisdictional statute is incorrect, we are comforted by the knowledge that the Supreme Court can tell us so, or Congress can make its wishes express."[92]

90. *See Dunn*, 913 S.W.2d at 623-24.

91. *LaRoche*, 661 So.2d at 863.

92. *Id.* at 864.

Appendix B

We REVERSE the trial court's order granting appellees' plea to the jurisdiction and REMAND the cause to the trial court for proceedings consistent with this opinion.

APPENDIX C — ORDER OF THE DISTRICT COURT, 93RD JUDICIAL DISTRICT, HIDALGO COUNTY, TEXAS GRANTING DEFENDANTS' PLEA TO THE JURISDICTION DATED NOVEMBER 25, 2002

IN THE DISTRICT COURT

93RD JUDICIAL DISTRICT

HIDALGO COUNTY, TEXAS

NO. C-1591-00-B

RICHARD FUQUA,

Plaintiff,

v.

THOMAS GRABER AND HOPKINS & SUTTER,

Defendants.

ORDER GRANTING DEFENDANTS' PLEA TO THE JURISDICTION

On this the 25 day of November, 2002, came on to be heard Defendants' Plea to the Jurisdiction. The Court, after having considered the motion, arguments and the pleadings on file, is of the opinion that Defendants' Plea to the Jurisdiction should be GRANTED. It is therefore,

ORDERED, that Defendants' Plea to the Jurisdiction is GRANTED and all claims are hereby DISMISSED.

Appendix C

This Order of Dismissal disposes of all matters pending before the Court. All relief not expressly granted herein is denied. This Order of Dismissal is final and appealable.

SIGNED this 25 day of November, 2002.

s/ [illegible]
JUDGE PRESIDING

APPENDIX D — ORDER OF THE SUPREME COURT OF TEXAS DATED MAY 1, 2009 DENYING MOTION FOR REHEARING

THE
SUPREME COURT
OF TEXAS

Case # 05-0303

Event Information:

Event Type: Motion for Rehearing - Disposed

Description: To identify a cause in

Date: 5/1/2009

Disposition: proceeding denied

APPENDIX E — PLAINTIFF'S SECOND AMENDED PETITION FILED APRIL 17, 2002

CAUSE NO. C-1591-00-B

IN THE DISTRICT COURT
HIDALGO COUNTY, TEXAS
93rd JUDICIAL DISTRICT

RICHARD L. FUQUA

Plaintiff

V.

THOMAS GRABER and HOPKINS & SUTTER

Defendants

PLAINTIFF'S SECOND AMENDED PETITION

TO THE HONORABLE JUDGE OF THIS COURT:

COMES NOW, RICHARD L. FUQUA ("Fuqua"), Plaintiff herein, and complains of THOMAS GRABER ("Graber") and HOPKINS & SUTTER, ("Hopkins & Sutter"), Defendants herein, and for cause of action shows.

Appendix E

I.

Discovery Level

Discovery in this matter is intended to be conducted under Level Three (3) of the Texas Rule of Civil Procedure 190.

II.

Parties

A. Plaintiff, RICHARD L. FUQUA, is an individual residing in Houston, Harris County, Texas.

B. Defendant, THOMAS GRABER, is an individual residing in Dallas, Dallas County, Texas. This Defendant may be served with process herein by serving him at 1201 Elm Street, Dallas, Dallas County, Texas 75207. This Defendant has answered; therefore, no service is requested at this time.

C. Defendant, HOPKINS & SUTTER, is a partnership including professional corporations with its principal office located in Chicago, Illinois. Said Defendant may be served with process herein by serving any of its general partners or members at: Sutter & Hopkins, 70 West Madison Street, Three First National, Plaza, Suite 4100, Chicago, Cook County, Illinois. This Defendant has answered; therefore, no service is requested at this time.

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III.

Venue

Venue in this case is proper in Hidalgo County pursuant to Texas Civil Practice and Remedies Code, §15.002 in that all or a substantial part of the events or omissions giving rise to the claim occurred in Hidalgo County.

IV.

Background

1. The events leading up to this lawsuit began prior to 1998. At that time, Fuqua was an attorney representing an individual named George Aubin ("Aubin") with respect to the purchase of a horse farm in Lexington, Kentucky. Aubin initially believed he was going to obtain financing for the purchase of the horse farm from the Mercury Ben Milam Savings & Loan, however, the Texas Banking Regulatory Commission issued a directive barring Aubin from borrowing any money from Mercury Ben Milam Savings & Loan. Thereafter, Aubin contacted another friend, Jarrett Woods ("Woods"), and, along with real estate investors James Hague ("Hague") and Louis Reese ("Reese"), began structuring a deal to finance the purchase of the horse farm. Hague and Reese purchased a large parcel of land near Dallas, Texas with the purchase being funding by Woods' financial institution. The transaction was to result in excess funding equal to the amount

necessary for Aubin to purchase the horse farm. The transaction spun off approximately $14,000,000.00 and additional funding was secured from other lending institutions by Aubin to finalize the horse farm transaction.

2. In December 1988, FUQUA filed a Chapter 7 Bankruptcy in the Bankruptcy Court for the Southern District of Texas, McAllen Division. Soon thereafter, in 1989, GRABER, a partner in the law firm of HOPKINS & SUTTER, wrongly filed an adversary action on behalf of a financial institution known as Sunbelt Savings, styled Sunbelt Savings, F.S.B. v. Richard Fuqua, Adversary No. 89-0071-M. In the adversary action, GRABER, on behalf of Sunbelt Savings ("Sunbelt"), alleged that FUQUA conspired with Woods, Aubin, Hague and Reese to defraud Sunbelt out of more than $37,000,000.00. The adversary proceeding was filed by HOPKINS & SUTTER on behalf of an entity that did not own any claim against FUQUA. HOPKINS & SUTTER knew or should have known that Sunbelt Savings did not own any claim against FUQUA.

3. During the course of discovery in the pending civil adversary proceeding filed by HOPKINS & SUTTER, on behalf of Sunbelt, GRABER began creating and delivering information including affidavits from individuals that was false and intentionally misleading as to FUQUA. GRABER and HOPKINS & SUTTER participated in a criminal referral being made to the Department of Justice asserting as true facts and suspicions alleged by GRABER in the then pending

bankruptcy case regarding FUQUA's involvement with Woods, Aubin, Hague and Reese. Eventually, the Justice Department, with GRABER's assistance, intervened in the adversary proceeding and informed the bankruptcy judge that there was a pending criminal investigation, that although FUQUA and Aubin had already testified in the pending civil discovery, the witnesses for whom GRABER had prepared affidavits were now the prime witnesses for GRABER and the Government in the then pending criminal investigation, and that depositions of GRABER's witnesses scheduled in the adversary proceeding would hinder the criminal prosecution. And, as a result of the Government's intervention in the adversary proceeding, the bankruptcy judge stayed any actions by FUQUA in the adversary proceeding for approximately three years while the criminal investigation proceeded.

4. Premised on the affidavits together with the false and misleading information supplied by GRABER, FUQUA and Aubin were indicted for bank fraud and tax fraud. At the criminal trial of FUQUA and Aubin, Aubin was convicted. In fact, all of Aubin's partners (Woods, Hague and Reese, at one time or another and were convicted of bank fraud or other related federal felonies, began serving prison terms, and then began working with GRABER to formulate the affidavits that GRABER delivered to the Department of Justice. FUQUA was found not guilty by the jury and was acquitted of any wrongdoing whatsoever.

5. After FUQUA was acquitted in the criminal trial, the adversary proceeding from which FUQUA had been restrained by virtue of the Department of Justice and GRABER heated up again and went to trial on September 23, 1996. At the end of a three day trial, the court found that there was no credible evidence to support the Plaintiff's allegations against FUQUA and that FUQUA was merely an attorney representing a client, Aubin. The court granted FUQUA's motion for directed verdict. A judgment was entered in favor of FUQUA and against Sunbelt Savings on May 13, 1997. This judgment was appealed by Sunbelt Savings. The appeal was dismissed by order the United States District Court for the Southern District of Texas, McAllen Division, on September 8, 1998. At all material times, GRABER was acting as lead counsel for Sunbelt Savings and successor entities, and was directing all activities in the adversary actions against FUQUA. At all material times, GRABER was the agent of HOPKINS & SUTTER where he was a partner at all relevant times.

V.

Malicious Prosecution

6. Plaintiff realleges herein all factual allegations set forth above and incorporates them by reference.

7. In 1989 GRABER and HOPKINS & SUTTER filed a civil adversary proceeding against FUQUA and soon thereafter also began conspiring with known and admitted criminals to assist and provide to the Justice

Appendix E

Department inaccurate, incomplete and untrue statements of fact among which were affidavits prepared by GRABER for felons with whom GRABER fashioned affidavits that were false and upon which GRABER knew the Government would rely concerning FUQUA and his involvement in the purchase of the horse farm. Based on the affidavits composed and prepared by Defendants together with false and incomplete statements to the Justice Department, FUQUA was indicted and arrested for bank fraud. In addition to the adversary proceeding, the Defendants also caused and/or assisted in the filing of a criminal referral against FUQUA with the United States Justice Department. The criminal referral and subsequent indictment, and the adversary proceeding all accused FUQUA of committing fraud and conspiring to commit fraud against Sunbelt Savings as the successor of Western Savings Association.

8. The civil action and the subsequent criminal action were all terminated in favor of FUQUA. Judgments were entered on the merits in FUQUA's favor and all appeals have run their course and concluded with final judgments in FUQUA's favor.

9. Furthermore, FUQUA was innocent of the charges brought against him in both the civil and criminal proceedings. Defendants knowingly, maliciously and wantonly acted without probable cause in initiating the civil adversary proceeding, as well as initiating the criminal proceeding as an additional adversarial tactic against FUQUA during the pendency of the civil proceeding. Defendants acted without probable cause

in making statements to the Justice Department in that they did not honestly, reasonably, and in good faith believe the affidavits or the criminal referrals that FUQUA was guilty of the crimes alleged, charged or claimed by GRABER and HOPKINS & SUTTER in the documents approved, prepared and submitted by Defendants to the courts and representatives of the United States of America.

10. As described in paragraphs 3 and 4, Defendants acted maliciously in initiating the criminal proceeding as an adjunct to the adversary proceeding. Further, Defendants acted maliciously in disseminating false and incomplete affidavits and statements to the Justice Department regarding FUQUA's involvement with Aubin and in the purchase of the horse farm. Defendants' actual malice towards FUQUA was actuated by spite and ill will towards FUQUA and Defendants' desire for personal and financial gain.

VI.

Actual Damages

11. Plaintiff realleges herein all factual allegations set forth above and incorporate them by reference.

12. As a proximate result of the civil and criminal prosecution, FUQUA suffered injury to his feelings, reputation, health, and character, and was generally impaired in his social and professional standing. FUQUA also suffered great embarrassment, humiliation, and

mental anguish and suffering, all to his damage in a sum within the jurisdictional limits of this court.

13. As a further proximate result of the civil and criminal prosecution initiated by Defendants, FUQUA incurred the cost of attorneys' fees in defending against both the civil adversary proceeding and the criminal proceeding in a sum within the jurisdictional limits of this court.

VII.

Special Damages

14. Plaintiff realleges herein all factual allegations set forth above and incorporates them by reference.

15. As a direct and proximate result of civil and criminal proceedings initiated by Defendants and Defendants' conduct as set out herein above, FUQUA was indicted and physically arrested and subsequently tried for bank fraud.

VIII.

Exemplary Damages

16. Plaintiff realleges herein all factual allegations set forth above and incorporates them by reference.

17. By virtue of the fact that the foregoing conduct of the Defendants was willful, wanton, and malicious, FUQUA also seeks recovery of exemplary damages in a sum within the jurisdictional limits of this Court.

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IX.

Jury Demand

18. Plaintiff hereby makes a request for a jury trial in this cause pursuant to Rule 216 of the Texas Rules of Civil Procedure and has deposited with the District Clerk of Hidalgo County, Texas the requisite jury fee of THIRTY DOLLARS AND/NO 100THS ($30.00).

X.

Prayer

WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that the Defendants be cited to appear and answer, and that on final trial, Plaintiff have:

1. Judgment against Defendants, jointly and severally, for a sum within the jurisdictional limits of this Court;

2. Prejudgment interest as provided by law;

3. An award of exemplary damages against Defendants, jointly and severally;

4. Post judgment interest as provided by law;

5. Costs of suit; and

6. Such other and further relief to which Plaintiff may be justly entitled.

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Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF
RICHARD L. FUQUA

APPENDIX F — DEFENDANTS' THIRD AMENDED ORIGINAL ANSWER FILED OCTOBER 22, 2002

NO. C-1591-00-B

IN THE DISTRICT COURT

HIDALGO COUNTY, TEXAS

93rd JUDICIAL DISTRICT

RICHARD FUQUA,

Plaintiff,

v.

THOMAS GRABER AND HOPKINS & SUTTER,

Defendants.

DEFENDANTS' THIRD AMENDED ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

THOMAS GRABER and HOPKINS & SUTTER, the Defendants in the above-styled and numbered cause, file their Third Amended Original Answer to Plaintiff's Second Amended Petition and for such answer would show the following:

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PLEA TO THE JURISDICTION

1. Plaintiff's Second Amended Petition purports to state a cause of action for malicious prosecution arising out of the filing and prosecution of an adversary action allegedly filed by Defendant Graber, a partner in the law firm of Defendant Hopkins & Sutter, on behalf of Sunbelt Savings, F.S.B. ("Sunbelt"). The adversary action in question was to determine whether Sunbelt's claims against Plaintiff were to be discharged in the voluntary bankruptcy proceeding filed by Plaintiff in the United States Bankruptcy Court for the Southern District of Texas, McAllen Division, *In Re Richard Lee Fuqua, II*, No. 88-02047-M-7 (Bankr. S.D.Tex. 1988) (the "Bankruptcy Case").

2. Plaintiff's malicious prosecution claim is premised on a prior proceeding to determine dischargeability of a debt in Plaintiff's bankruptcy. As a result, Plaintiff's claim is preempted by Federal bankruptcy law and this Court lacks subject matter jurisdiction to hear and determine the matter. Defendants pray that this Court dismiss the above-styled and numbered cause for lack of subject matter jurisdiction.

GENERAL DENIAL

3. Defendants hereby enter their General Denial in accordance with Rule 92 of the Texas Rules of Civil Procedure.

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SPECIAL DENIAL

4. Defendants' deny that they are liable in the capacity in which they are sued as the civil action at issue in this cause was filed by Sunbelt Savings, F.S.B. and its successors, and was not instituted or continued by either of these Defendants.

AFFIRMATIVE DEFENSES

5. Pleading further if that be necessary and without waiver of the foregoing, Defendants allege that the conduct complained of was undertaken in the discharge of Defendants' duties as attorneys representing their client. Plaintiff's claims, therefore, are barred by the attorney immunity defense.

6. Pleading further if that be necessary and without waiver of the foregoing, Defendants allege that the filing of a Complaint to Determine Dischargeability is essentially a defensive matter and, therefore, the filing of such Complaint is not the initiation of a proceeding that will support a claim of malicious prosecution.

WHEREFORE, PREMISES CONSIDERED, DEFENDANTS THOMAS GRABER and HOPKINS & SUTTER respectfully request that the Court:

(i) sustain their plea to the jurisdiction and dismiss the above-styled and numbered cause without prejudice for lack of subject matter jurisdiction; or, in the alternative

(ii) upon final hearing enter judgment for Defendants that Plaintiff RICHARD FUQUA take nothing by his suit and award Defendants their costs; and

(iii) grant Defendants such other and further relief, at law or in equity, as to which they may be justly entitled.

Respectfully submitted,

s/ Robert H. Mow, Jr.
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Appendix F

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